Public Utilities

FORTNIGHTLY

April 9, 1942

FULL TEXT OF SUPREME COURT'S DECISION IN FEDERAL POWER COMMISSION v. NATURAL GAS P.PELINE COMPANY

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Making the War Work for Utilities
By M. R. Kynaston

« »

Should the State Commissions Help Ration Utility Service?
By Francis X. Welch

« »

Aluminum Output Reaches for New Power
By T. N. Sandifer

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VOLUME XXIX *April 9, 1942* NUMBER 8

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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Pages with the Editors

WELL, it begins to look as though the rejuvenated Supreme Court has finally gotten around to the unfinished business of polishing off Smyth *v.* Ames. The full text of the recent decision in Natural Gas Pipeline Company *v.* Federal Power Commission, in which this deed was accomplished, is to be found in the *Public Utilities Reports* section of this issue (42 PUR(NS) 129). An analysis of somewhat conflicting opinions and reactions to the Supreme Court's treatment of Smyth *v.* Ames appears in the review section ("What Others Think," page 505).

IF you belong to one school of thought you will say that old Smyth *v.* Ames finally got what was coming to him. If you belong to the opposite school of thought you may say that the Supreme Court has merely waved the sword over the head of Smyth *v.* Ames, but so far it has missed him. Thus, you may argue that Smyth *v.* Ames is still the "law of the land," at least technically. Or you may take a compromised position that Smyth *v.* Ames has probably been knocked from his perch as the "law of the land." Chief Justice Stone, in a recent majority opinion of the highest court, pointedly refused to administer the final *coup de grâce.*

M. R. KYNASTON

It is the duty of alert management to capitalize every war-made silver lining.

(SEE PAGE 465)

WHATEVER one's feelings on the subject may be, we rather hate to see old Smyth *v.* Ames go. It was perhaps the most controversial decision of the Supreme Court since the Dred Scott case. Indeed, if memory serves us rightly, the Right Reverend John A. Ryan of Catholic University, in an article in this magazine some years ago, referred to Smyth *v.* Ames as the "Dred Scott decision of public utility regulation." The peculiar thing about Smyth *v.* Ames is that it actually represented a victory for the ratepayers against the public utility interests of that day—1898.

YET, by one of those paradoxical twists of events so frequently found in the devious paths of the law, Smyth *v.* Ames became the target of antiutility critics. It became the "bastion of vested interests"—to use the grandiloquent phrase of a late regulatory reformer.

THE facts in the case of Smyth *v.* Ames are generally overlooked in the heated controversy over the rule (or lack of rule, if you wish) laid down by the Supreme Court in Smyth *v.* Ames. It almost approaches the famous principle in the old English law of real property, known as the "Rule in Shelly's case." It is a favorite trick for law teachers to ask a superficial student, "What were the facts in Shelly's case?" Very often the student will try to fake the facts by implication from the well-known Rule. The truth of the matter is we don't know what the facts were in Shelly's case. We only have the rule.

BUT we do know the facts in Smyth *v.* Ames, even though they are commonly overlooked. Who was Smyth? Who was Ames? Smyth was the attorney general of Nebraska in 1894. As such, it was his duty to defend the validity of a Nebraska statute limiting railroad rates in that state. Ames headed a group of stockholders of the Union Pacific Railroad Company, who attacked the Nebraska law on ground that it resulted in the confiscation of the railroad company's property.

THE late William Jennings Bryan argued the case for his native state. It is no disrespect to the Great Commoner to say that it is one of the few important cases which he won. The fame of Bryan's forensic prowess, like that of his precursor, Daniel Webster, attracted the

most difficult cases to his office. His clients expected legal miracles; and only occasionally got them.

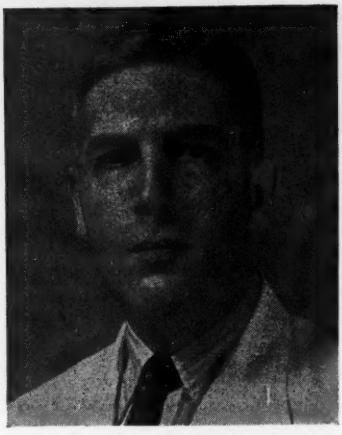
In a word, the court upheld Bryan and the state of Nebraska. The railroad people had attempted to show that the Nebraska rates would not have allowed a fair return on the capitalized investment of the railroad company. Bryan contended that the capitalized investment was wringing wet, that some consideration should be made for the actual value of the company's property. What Bryan obviously had in mind was the tangible value—in terms of steel and ties and so forth, rather than allegedly watered stock.

In short, Bryan was arguing for what we would call today, "present fair value." Yet this is the very term which has become anathema to the regulatory reformers who have rallied around Justice Brandeis' more recent theory of prudent investment. Prudent investment is the righteous and certainly more prudish sister of that same "capitalized investment," originally sponsored in 1898 by Ames and his belligerent band of Union Pacific stockholders.

Well, as most of us are now aware, the public utilities and their rate critics have changed sides since Smyth *v.* Ames. A very precise student of regulation could make out a case for the proposition that they have changed sides *three* times since Smyth *v.* Ames. During the depression of the thirties, when property values on a reproduction cost basis were dropping steadily through the bottomless bottoms of market quotations, we heard very little "thunder on the left" about the inequity of Smyth *v.* Ames.

Public service commissions, anxious to reduce rates for impoverished utility consumers, found little fault with "present fair value." They used it to good effect in buttressing their rate reduction orders. But now that prices are again skyrocketing under the influence of the war emergency, Smyth *v.* Ames is again in the dog house. Without trying to get into any fresh argument over this much argued decision, it looks as if it won't have to stay in the dog house very long. It looks as if the Supreme Court has just about sounded the death knell.

So let us not disturb the passing of this venerable landmark of regulation with petty argument over whether he is dead or dying, or whether the news of his demise has been greatly exaggerated. The life of this decision has been too full of controversy to have it follow him to the grave. Whatever we may have thought about Smyth *v.* Ames while he was in the full vigor of his position as Ruling Case Law, let us now remove our hats as the bier of this old and prominent figure of regulation is borne to its resting place. And if we cannot find it in our hearts to say *requiescat in pace*, let us at least say *de mortuis nil nisi bonum.*



T. N. SANDIFER

Aluminum production has become the tapeworm of the nation's electric power reserves.

(See Page 489)

M. R. Kynaston, whose somewhat surprising article on the opportunities which the war offers public utilities begins on page 465, is a contributor whose previous articles will doubtless be recalled by faithful readers of the Fortnightly. He is now a private business and financial consultant in the nation's capital.

T. N. Sandifer, whose article on the power demands of the new aluminum production program begins on page 489, is a special writer contributing to magazines in various fields. He was a White House correspondent for International News Service during part of the present administration. He is now covering Washington assignments.

Francis X. Welch, whose article on the rôle of the state commissions in rationing of utility service begins on page 477, is a member of our own editorial staff.

The next number of this magazine will be out April 23rd.

The Editors

In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 129—192, from 42 PUR(NS)

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

CLYDE T. ELLIS
U. S. Representative from Arkansas.

"If we do not expand our power production, we may lose this war."

THOMAS C. BUCHANAN
Member, Pennsylvania Public Utility Commission.

"Labor is not dumb. It keeps its eye on the cash register as well as the directors."

JOHN E. RANKIN
U. S. Representative from Mississippi.

"The time will come when the American people will use 1,000,000,000,000 kilowatt hours of electricity a year."

HARLAN F. STONE
Chief Justice, United States Supreme Court.

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas."

WALTER E. SPAHR
Secretary-treasurer, Economists National Committee on Monetary Policy.

". . . if $50,000,000,000 per year is to be spent, not over $15,000,000,000 of it should be raised by taxation within the same year."

HAROLD STRAUSS
Associate editor, publishing firm of Alfred A. Knopf.

"Second only to military victory as a major problem of American society is the transformation of full war production to full peace production when the struggle is over."

CLIFTON A. WOODRUM
U. S. Representative from Virginia.

"Let us devote all of our interest today to this war effort, and do not ever go on the assumption that a hydroelectric plant that you start to work on now could ever help win this war."

RAYMOND MOLEY
Writing in The Wall Street Journal.

"It's useless to talk about what Mr. Nelson can do in terms of what Mr. Baruch did do. First, Mr. Nelson is not Mr. Baruch. Second, and even more important, Mr. Roosevelt is not Mr. Wilson."

WALTER D. FULLER
President, Curtis Publishing Company.

"We must help in reëstablishing the principle that in America government was created to protect the people while they do business—not to do business while the people protect themselves from government."

ARTHUR H. VANDENBERG
U. S. Senator from Michigan.

". . . I am perfectly willing to vote for an emergency reliance . . . ; but I do not want to find out six months from today that, under that guise and in the form of this rather innocent legislation [to take over communications facilities in time of war], I voted for government ownership and operation of all the telephone systems of the United States."

MARRINER S. ECCLES
Chairman of the board, Federal Reserve System.

"I hope that the businessmen of America will set an example to the farmers and to the laborers and will no longer talk of the need of the profit motive, the profit incentive, to get them to put forth their best effort and to do their part, because if that is going to be the basis for the determination of what we are going to produce, then I say we have already lost the battle."

EDWARD FLYNN
Executive vice president, Burlington Railroad.

"Railroads are an important part of this country's war machine and there is no doubt that we will be able to carry out the task assigned to us, if sufficient maintenance and replacement equipment is made available. I cannot visualize any volume of traffic that would handicap the railroads. I sincerely believe the railroads can move any volume of traffic anticipated by the government, if given a little advance notice to marshal equipment."

WILLIAM TRUFANT FOSTER
Director, Pollak Foundation for Economic Research, Inc.

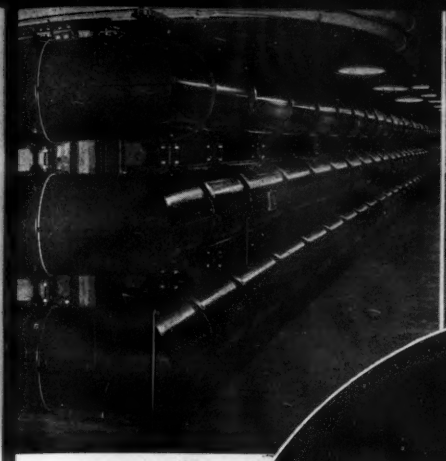
"All attacks on prices fail presently in a free country because they ignore the function of price. The function of price is to move goods. When there are no arbitrary interferences, goods are moved. The fact that the goods are moved shows that prices are right. Rising prices are signs of trouble; not causes of trouble. To attack prices gives no more promise of relief than to smash the thermometer because the temperature is too high."

SUMNER H. SLICHTER
Professor, Harvard University.

"If private enterprise does a good job of providing work and economic opportunity, the government, on the whole, will leave well enough alone and will confine itself to dealing with special situations. If it does a poor job of giving employment the government will attempt to do something about it and the result will be that the decision of many industrial policies will be transferred from businessmen and trade unions to the government."

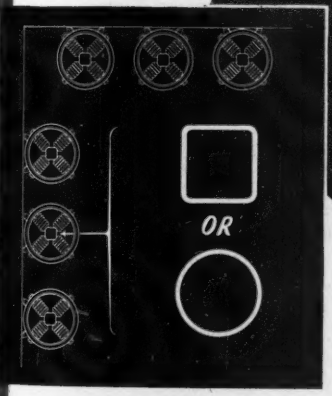
CHANNING POLLOCK
Well-known lecturer, author, and publicist.

". . . we're in a grand new order that regulates everything from the length of shirttails to the method of doing business in a Chinese laundry. We are in the hands of a dozen men of such omniscience and omnipotence, of such illimitable and godlike wisdom, that they are perfectly capable of planning your life and my life; the lives and destinies of 130,000,000 people. Under their rule, we're hell-bent for Utopia, and fairly certain of getting to one place or the other."



...te neat, streamline ...pearance—easily ac- ...sible to inspection and ...justment.

... superstructure nec- ...ary—easily mounted ... wall or ceiling. Note ... gap between phases. ...ses can be round or ...uare as shown below.



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- **Gasketed covers are housings only, —take none of the stress.**
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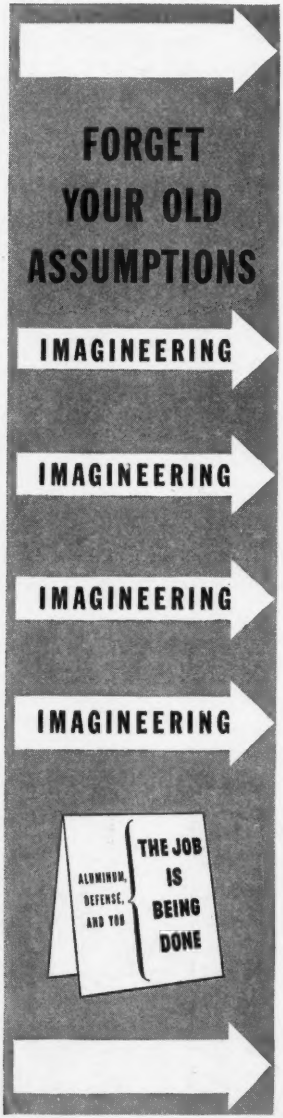
GREENSBURG, PA. . . . . In Canada, EASTERN POWER DEVICES, Ltd., TORONTO



IN THESE DAYS an advertisement is no place either for hosannas or sermons about production. Every man knows how well he is doing the job that is before him. Deeds, not words, are the measure.

BUT WORDS CAN BECKON beyond the realms of immediate duty.

IMAGINEERING is such a word. We coined it to make the needs of the future a reality, here and now. It is a way of describing what a man can do about the day when . . .

HOW DO YOU DO IT? You let your imagination soar and then engineer it down to earth. You think about the things you used to make, and decide that if you don't find out some way to make them immeasurably better you may never be asked by your customers to make them again.

YOU FORGET YOUR OLD ASSUMPTIONS. For instance, you may be one who used to assume that aluminum was too expensive. Even if you were right then (and you may not have

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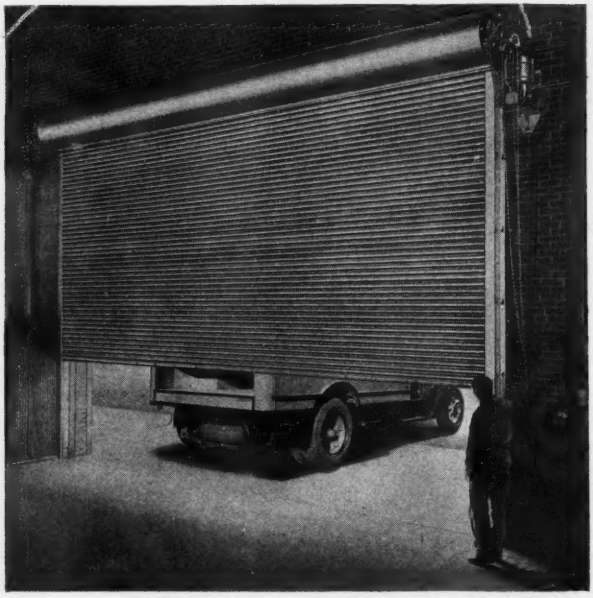
BETTER DOOR SERVICE

with less servicing!



You get more than t
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And they open *out of rea*
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weather or vehicles, avoi
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venient points!

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Facts You Can Use To Cut Distribution Costs . . .

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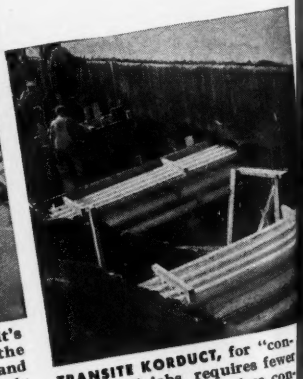
THE long lengths and light weigh Transite Ducts make assembly e fast and economical, even when unski crews are used. Transite Conduit is strong it needs no concrete envelope substantially reduces installed costs, ticularly where a small number of d per trench is involved.

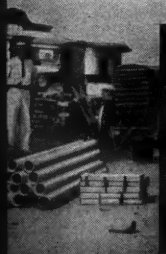
Transite Korduct, for use in concr makes further savings because its l lengths mean fewer spacers, fewer jo to make up. Due to its asbestos-cem composition, it requires less concrete se ration for equivalent heat dissipation fire protection between cables. For tails, write for brochure DS-410. Joh Manville, 22 E. 40th St., New York, N

FAST, ECONOMICAL INSTALLATION is assured because of the long lengths and light weight of Transite Ducts. Handling and assembly are simple and easy . . . lining up is rapid and accurate. And when installed underground, Transite Conduit eliminates all the expense of a concrete casing . . . holds its true form under sustained earth loads and traffic pressure.

ABOVE GROUND, Transite Conduit's unusually high resistance to the destructive action of weather and corrosive fumes and gases frequently enables it to outperform more expensive ducts commonly installed in such locations.



TRANSITE KORDUCT, for "concreted-in" jobs, requires fewer spacers, fewer joints, less concrete separation. And its high thermal conductivity dissipates heat rapidly, increasing system capacity.



FOR EFFICIENT, LOW-COST SERVICE, SPECIFY...

JM Johns-Manville

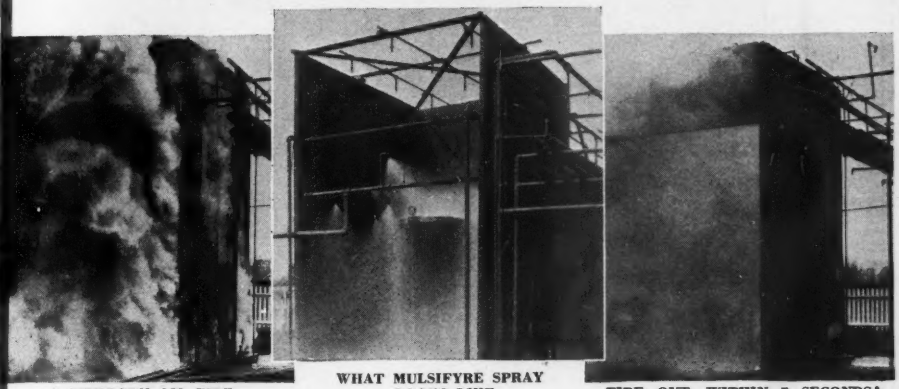
TRANSITE DUCTS

TRANSITE CONDUIT . . . For use underground without a concrete envelope and for exposed locations.

TRANSITE KORDUCT . . . For installation in concrete. Thinner walled, lower priced, but otherwise identical with Transite Conduit.

GRINNELL MULSIFYRE

Snuffs Out Oil Fires with Mulsifying Spray of Water!



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In generating plants, switch yards, substations . . . wherever oil-filled apparatus or lubricating systems are employed . . . Grinnell Mulsifyre Systems now give permanent, positive protection against oil fires. The instant the system is turned on, either manually or automatically, a driving spray of water strikes the oil . . . churns the surface into a non-flammable emulsion . . . smothers flames within a few seconds! The water soon separates itself from the oil as the emulsion breaks down.

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TYPE 125 LIQUID LEVEL CONTROL. Suitable for use on Transformers.

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TYPE DA-35 TEMPERATURE CONTROL. Used with blower fan applications for transformers.

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A WAR TIME NECESSITY

Automatic controls play a vital part in domestic and industrial engineering. They assume special importance during war time emergencies.

Time, and the efficiency of both man and mechanical power must be conserved.

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Mercoid Switches, the distinguishing feature, used exclusively in all Mercoid Controls, are especially designed types of hermetically sealed mercury switches. They are not affected by dust, dirt, moisture or corrosive gases, nor are they subject to open arcing, oxidation, pitting or sticking of contacts—common causes of trouble.

Keep these important facts in mind when selecting automatic controls. The line is complete and our cooperation is at your service.

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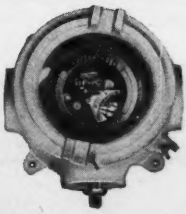
No. 855 EHT EXPLOSION-PROOF THERMOSTAT. Line voltage type.

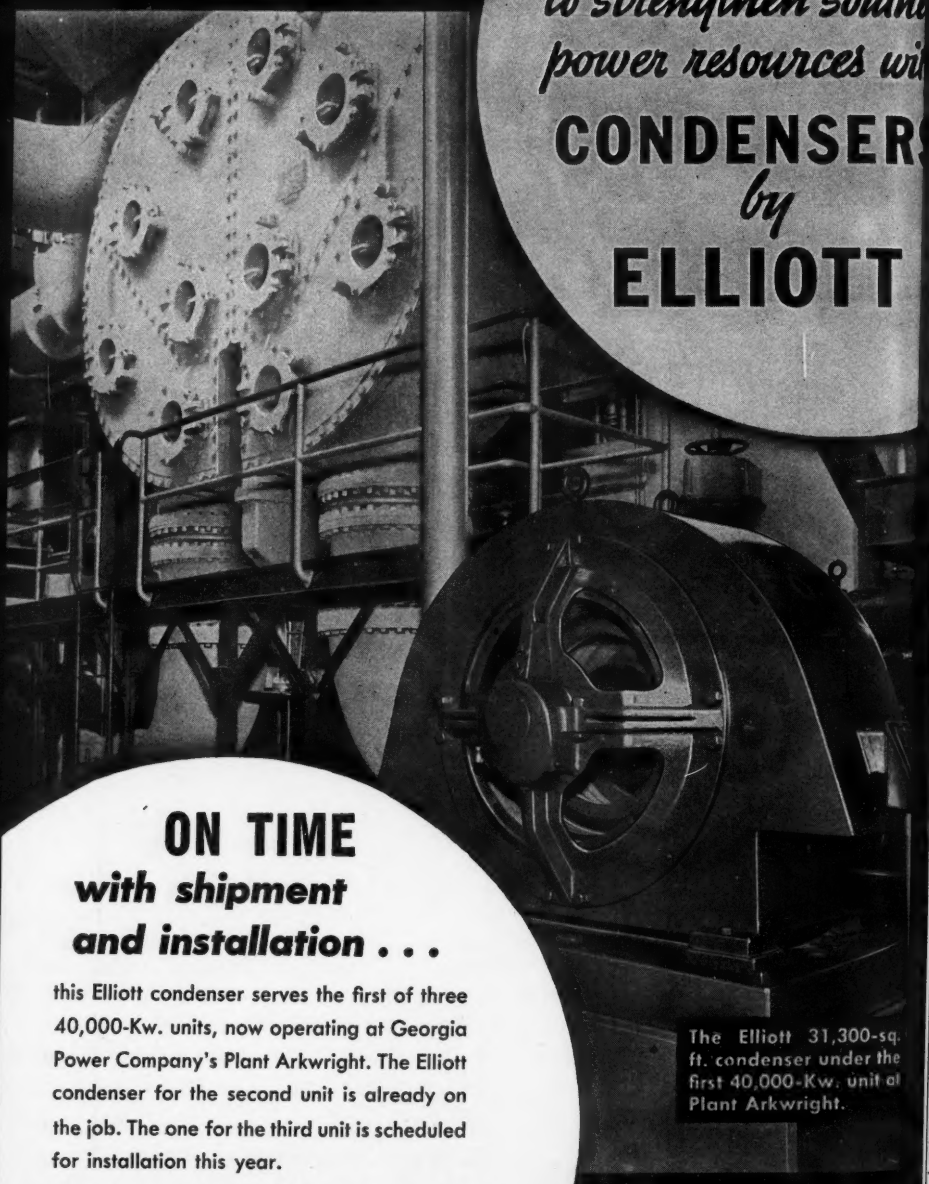


TYPE 970 EXPLOSION-PROOF CASE for Temperature and Pressure Controls

TYPE 76 EH EXPLOSION-PROOF INDUSTRIAL LIQUID LEVEL CONTROL.

The GEORGIA POWER COMPANY helps to strengthen southe power resources wi

CONDENSERS by ELLIOTT



ON TIME
with shipment and installation . . .

this Elliott condenser serves the first of three 40,000-Kw. units, now operating at Georgia Power Company's Plant Arkwright. The Elliott condenser for the second unit is already on the job. The one for the third unit is scheduled for installation this year.

The first condenser is doing a good "characteristically Elliott" job, with excellent performance records — a natural result of careful engineering to obtain maximum condensing effect with least pumping and auxiliary cost.

C-376

The Elliott 31,300-sq. ft. condenser under the first 40,000-Kw. unit at Plant Arkwright.

ELLIOTT COMPANY
Heat Transfer Dept.
JEANNETTE, PA.
DISTRICT OFFICES IN PRINCIPAL

Utilities Almanack

APRIL

9	Th	¶ *Midwest Power Conference starts session, Chicago, Ill., 1942.* ¶ *American Water Works Association Ind. Sec., convenes, Lafayette, Ind., 1942.*
10	F	¶ *Northwest Electric Light and Power Association, Engineering and Operating Section, will hold session, Seattle, Wash., Apr. 23, 24, 1942.*
11	Sa	¶ *Maryland Utilities Association will hold spring meeting, Baltimore, Md., Apr. 24, 1942.*
12	S	¶ *Association of Iron and Steel Engineers will hold spring conference, Hamilton, Ont., Can., Apr. 27, 28, 1942.*
13	M	¶ *Mid-West Gas Association opens meeting, Sioux City, Iowa, 1942.*
14	Tu	¶ *Missouri Association of Public Utilities convenes, St. Louis, Mo., 1942.* ¶ *Nebraska Telephone Association starts session, Omaha, Neb., 1942.*
15	W	¶ *Electrochemical Society starts spring convention, Nashville, Tenn., 1942.* ¶ *Amer. Water Works Asso., Canadian Sec., convenes, Niagara Fall, Ont., 1942.*
16	Th	¶ *National Society of Professional Engineers opens meeting, Atlantic City, N. J., 1942.*
17	F	¶ *American Water Works Association, Montana Section, convenes, 1942.*
18	Sa	¶ *Chamber of Commerce of the United States will hold annual meeting, Chicago, Ill., Apr. 27–30, 1942.*
19	S	¶ *Gas Meters Association of Florida-Georgia starts convention, Savannah, Ga., 1942.*
20	M	¶ *American Institute of Electrical Engineers, Northeastern District, will convene, Schenectady, N. Y., Apr. 29–May 1, 1942.*
21	Tu	¶ *Southwestern Gas Measurement Short Course begins, Norman, Okla., 1942.* ¶ *Ohio Independent Telephone Association convenes, Columbus, Ohio, 1942.*
22	W	¶ *American Society of Civil Engineers starts spring meeting, Roanoke, Va., 1942.*

From an etching by Harry Sternberg *Courtesy, Kennedy & Co., New York*

Blast Furnace

Public Utilities

FORTNIGHTLY

VOL. XXIX; No. 8 APRIL 9, 1942

Making the War Work For Utilities

Believe it or not, the war emergency provides a number of opportunities for public utilities to improve their position from the standpoint of operation, regulation, and finance. The author of this article picks out and analyzes some of these opportunities.

BY M. R. KYNASTON

MAKING the war work for utilities — that is a provocative title. It is a line which is bound to draw the squint eye of suspicion from any ardent patriot—as who isn't these days. But relax. It's not Fifth Column stuff nor even "parasite" pap. It's common sense.

Utilities have to work for the war. We all do. But utilities have to work harder than most of us, for reasons which are so obvious that there is no use going into them. So! Is it not the patriotic duty, aside from the elementary motive of financial self-preservation, of the utilities to take advantage of those little opportunities which the war affords to improve their position against the tough days to come?

The utility manager who can find a silver lining, or a short cut, or a good break in the morass of war effort should use it to make his property stronger to serve the nation. It will need all the strength it can get. There will be more bad breaks than good ones. So let's get on with the story.

To introduce our Number One utili-

ty opportunity from the horny hand of Mars, we refer to the following little quotation culled from the antic pages of *The New Yorker*. It has to do with the necessity for keeping the old appliance apparatus operating for the duration:

> We foresee, as a result of war-time economies, a more cordial relationship between people and whatever things they may be fortunate enough to possess. We were damn sick and tired of salesmen coming around, whenever our automobile, radio, or icebox broke down, with proof incontrovertible that the wise thing to do was trade it in for a new one. Repairs were always fantastically impossible to arrange, but the minute the company had sold you a new machine and got possession of the old one, they repaired it ("rebuilt" was the euphemism employed) and proceeded to undermine the Good Neighbor policy by selling it on easy terms to a Central American Indian. From now on, there will be no more of this casting off a mechanism after it has given you the best years of its life.

THAT'S the idea all right. Service departments. If you can't sell appliances, you can certainly sell service. Turn your salesmen into repairmen if it is practical. Organize a systematic check-up campaign to keep the old gas range pleasing, the old vacuum cleaner wheezing, and the old icebox freezing. And how about a Used Appliance Exchange?

Keep your blue-ribbon repairmen busy thinking up little stunts and added features to beautify as well as rehabilitate the customer's old equipment. Maybe you can feature a special paint job, a bargain adjustment, or some little additional gadget to make the public more cheerful in making the best of what they've got on hand. Run such bargain ads in the newspapers or on the radio. (These ad-hungry media will rise up and call you blessed if you do.) There may even be some folding money in this idea for diligent and aggressive companies, aside from the advantage of keeping some faithful hired help on deck and improving the customer relations.

And speaking of ads, how about seizing this unparalleled opportunity for selling the *service* to the consumer in a great big way? Some utility men say that it always was a mistake for a utility to become so much interested in appliances that it forgot to sell the service. Well, anyhow, there is little choice these days. The flow of new appliances will soon be down to a puny trickle. Eventually it may cease altogether.

Perhaps appliance manufacturers, many of them bulging with defense orders, can afford to be philosophic about this turn of affairs. (Or can they?) They can speak of the "long-range view," and the desirability of a "backlog of frozen customer orders" that will thaw in the *post bellum* reconstruction era.

MAYBE SO. But meanwhile operating utility companies have got to keep their customers satisfied. Today's selling job is different, and the opportunity for service is gigantic. It is exemplified in the attitude of the rubber manufacturers, who are telling their customers how to increase the life of tires. A recent editorial in *Electrical World* strikes the same note, as follows:

> Is it true that meats shrink less and vegetables lose less of their vitamins with electric cooking? Is it true that there is less food spoilage with electric refrigeration? Is it true that clothes washed and ironed at home with electrical appliances last longer? Is it true that workers' and children's eyes show less strain when the lighting is good?
>
> If all these things are true, then electric utilities have a patriotic duty to help the public to get more out of their appliances

and to keep them in repair. That is today's selling. If it will help in our war effort, then sell it.

We must save food and clothing. We must preserve health. As domestic help goes into factories we must preserve the strength of housewives.

There may be fewer appliances to sell, but never was there a bigger selling job to do.

And when this thing is over the utilities will have found a larger place in the hearts of the people. Certainly the utilities will have learned once more to sell what they are in business for—to sell a public service. Selling must not stop.

That's pretty strongly loaded for electricity. Let this neutral writer hasten to add that the gas utilities have equally good arguments on their side. It's just a sample of what can be done. So don't be an Old Bull Durham. During World War I, Old Bull Durham, one of the most popular and most widely advertised tobacco lines, found itself all loaded up with war orders and quit advertising. "Why try to sell it when you haven't got it to sell?" That seemed to be the argument. Well, the war ended. Old Bull Durham never came back. Maybe the change in smoking habits had something to do with it. But anyhow, Old Bull Durham never came back. There's a lesson in this for all businessmen.

GENERALLY speaking, the opportunities to be found in the war situation for improving the utility position very slightly in some cases, perhaps, can be classified in the accompanying five categories. (See below.)

The first class is probably the most important at the moment. We are now going through a phase wherein shortages are showing up in all forms of utility service. So far, they have not been serious. For the immediate future, the general public will suffer little inconvenience and may not even notice it, except in some areas.

But hand in hand with this very shortage situation is the familiar old operating problem of supplying the peak demand. Defense activity has exaggerated the operating peak load for many gas and electric companies. In the case of transit and telephone companies the situation is even more serious.

Now, with the prospect of operating expenses increasing more and more as taxes, supplies, and wages go up, it is to the utility's advantage to get every additional revenue dollar it possibly can out of the off-peak service. To those who are not familiar with the economics of utility operations and who think that an electric power shortage can be helped by simply turning off unnecessary house lights in the middle of the night, it may seem strange even to be discussing ways and means of selling *more* utility service at this time. But it is by very reason

War-made Opportunities for Utilities

1. *Off-peak service opportunities.*
2. *Opportunities for operating economies.*
3. *Opportunities for improving the legal status.*
4. *Improving employee and public relations.*
5. *Post-war market opportunities.*

of the exaggerated power loads that opportunities for developing off-peak service are especially helpful to public utilities at this time. This is all very elementary to utility men, of course.

There are certain obvious off-peak service opportunities which now prevail for the various public utility companies. The accompanying list is just a general idea. By sharpening his wits, many a utility official could doubtless think of more detailed off-peak dollar revenue opportunities that could be developed in his own bailiwick.

SOME explanation of the brief list on page 469 is in order. There is the matter of blackouts. Blackouts occur in the nighttime and, for many electric companies, during off-peak hours. That means a serious loss of residential and light commercial revenue which the company might otherwise use to offset the cheap, large-scale, heavy industrial load of the daylight hours.

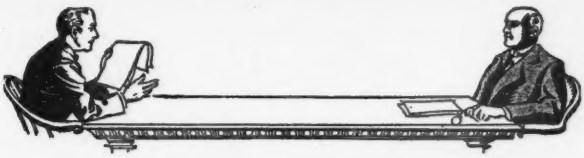
Consolidated Edison of New York city pointed the way along this line some months ago. Instead of having people hole themselves up in apartment house corridors or resident cellars around a candle during blackouts, the company made helpful and constructive suggestions for continuing the normal use of interior lighting. Consolidated Edison ran page ads in New York newspapers, giving simple instructions for making inexpensive blackout curtains that could be used to blackout the entire window frame of a dwelling and quickly removed, rolled up, and put out of the way when not in use.

In other words, the public was informed *for its own benefit* how it could continue to enjoy the blessing of normal lighting in its own home during blackouts. Needless to say, if people would use such curtains on *all* windows, it would be helpful in offsetting the sudden drop in the residential lighting load during blackouts which so often occur during off-peak hours.

There is a possibility — not always practical, perhaps—of carrying this idea further. There is a possibility of actively helping the consumers to obtain cheap and plentiful blackout material by buying it in quantities and releasing it at low cost through the utility merchandising units. Or, if active merchandising has not been a policy of the utility, it could be done through "dealer coöperation." No matter how it is done, the public will take kindly to the helpful gesture from its public utility and the utility will feel the benefit on its domestic consumer bills.

"Blackout parties" are simply suggestions for social entertainment along the same line. Point is that if "blackout parties" become a fad during the months to come, they will automatically result in people securing suitable blackout materials for *every window in the house,* not just a shelter room or shelter basement. You can't throw much of a party in just the basement, as the rotating hosts and hostesses will soon find out.

FOR gas companies the curtailed delivery service and in some cases the curtailed operation of large central laundry companies suggest a reversion to the old family wash tub. And a reversion to the old family wash tub will mean more gas consumption in terms of water heated by gas methods. Since most gas-fired automatic water heaters these days are of the thermos bottle



Off-peak Service Opportunities

Electric Companies	Blackout instructions Blackout parties
Gas Companies	Wash-at-home campaign Overnight cooking suggestions
Transit Companies	Chartered social service Vacation schedules
Telephone Companies	"Midnight round tables"

type, the consumption is spread out over long hours and should not of itself create any high-peak problem. Each particular gas utility, of course, has to determine the advisability for such a suggestion in the light of its own particular circumstances.

The shortage of man power is producing many more working wives and working daughters—which means less help in the kitchen during the daytime. This situation would seem to suggest that the home service departments of gas utilities might compose their cooking recipes with an eye to dishes which require overnight cooking, or of the long, slow-burning variety which the working housewife can more conveniently fit into her new routine. The orthodox method of preparing Boston baked beans is an example.

Transit companies are probably the hardest hit of all utilities by war-time peak demands. Yet they have an unprecedented opportunity to render off-peak service with equipment that would otherwise lie idle overnight in the barns or garages awaiting the morning rush hour. The opportunity is the vanishing American pleasure car—thousands upon thousands of which will be placed up on jacks as their tires wear out or as the gasoline scarcity dictates.

People crave entertainment during war as much as they do during peace and, as a matter of sound morale, they are entitled to it. This inspires a suggestion for chartering busses and street cars for private parties and public gatherings. Indeed, such chartered service will be about the only way older people, who are unable to walk or pedal bicycles, will get to Sunday or holiday picnics or vacation points in the months to come.

One enterprising transit company is already canvassing the business houses in its community with the idea of working out vacation schedules for employees this summer. Obviously, such service must be conducted strictly on an off-peak basis. But it is equally

obvious that much of it can be conducted in just that manner with resulting dollars in the cash register which otherwise would never have gotten there.

The telephone industry is doubtless well aware of its opportunities for developing off-peak long-distance and even local service. Its advertising literature clearly shows an intelligent appreciation of the necessity for diverting as much conversation into the evening and night hours as can be so diverted. The "midnight round table" idea is just a sample of what more might be done along this line.

The great American institution, the Business Convention, is probably in the dog house for the duration. Businessmen who used to travel—with or without wives—great distances on annual pilgrimages for state and national conclaves of their industry can do so no more. They are too busy. The railroads are too busy. The family car lacks tires. The hotels have no rooms.

But it follows from this that a good deal of the necessary business discussions that used to be held at such meetings will have to be done by telephone or correspondence. The "midnight round table" is simply an organized application of the Conference Service which telephone companies have been rendering for some time. It need not be at midnight at all. It could be held evening hours or over week-ends. It is a device whereby more than two persons—be they members of a committee or simply people having a mutual interest—can discuss a prearranged subject while individually located in far distant cities. The same idea can be used even in the same community, now that business luncheons and daytime meetings in downtown hotels have been curtailed.

Opportunities for Operating Economies

It took the war in its most brutal form of savage aerial bombardment to bring home to the British utilities the full possibility of joint coöperation between utilities. Demolition squads and fire-fighting squads of utility employees in Great Britain were organized and operated often without regard to the segregation of utility maintenance. The employee of a British electric undertaking pitched in and helped to put out fires on a gas holder. Employees of British electric undertakings work side by side with employees of the British post office in safeguarding and rehabilitating electric and telephone facilities, respectively.

We have not had any such pressure on our utility maintenance crews in the United States, and let us pray that we never will. But American opportunities for joint collaboration between various utility companies in repair, maintenance, and precautionary measures are present none the less.

Frederick F. Eichhorn, chairman of the Indiana Public Service Commission, has already made one forward-looking suggestion; namely, that the utilities look into the matter of pooling supplies and man power. Heretofore, if a gas utility and an electric utility—not affiliated by any intercorporate relationship—made use of the same meter reader, serious objections might have been heard from many quarters. The labor people would not like it. Under some circumstances, there might have been some question of violating

antitrust legislation through restraint of trade or unfair competition.

But the Attorney General has already given indication that the niceties of antitrust enforcement will not be permitted to stand in the way of any industrial coöperation which will help the nation's war effort, provided the public interest does not suffer. As for labor, the utilities need only point to the scarcity of experienced man power caused by the draft to justify any such coöperative action.

JOINT reading of gas and electric meters is a possible starting point. Whatever else can be done in the way of pooling supplies or pooling maintenance and repair crews and trucks would have to be studied carefully. An electric repairman is certainly not equipped to monkey with automatic dial telephone equipment. A telephone worker, however experienced in his own line, would be well advised to stay away from certain high-tension wire work. Again, there are very many items of telephone, electric, and gas equipment which are obviously so exclusive to their own respective service that any thought of pooling such supplies would be impractical on its face.

On the other hand, some items of repair and maintenance equipment—solder, sizes of wire, ditching and trenching machinery—might be sufficiently interchangeable among gas, electric, and telephone utilities as to form the basis of a community pool. Gas and water companies have some pipe problems in common. If anything can be done in the way of making one repair truck with a single set of tires and a versatile crew do emergency duty for more than one class of utility emergency, it is well worth looking into.

As the months wear on and skilled utility employees become still more scarce, there is a possibility of averaging quarterly meter readings for monthly bills instead of reading meters and making out individual bills every month. This might be especially suitable in sparsely populated service areas. Maybe out of this war experiments in interutility operating practices along these coöperative lines will be found sufficiently valuable to continue in the future. War has taught many such lessons of economy and industrial resourcefulness in the past.

Opportunities for Improving Legal Status

AS operating expenses increase, the need for increasing rates or rearranging the rate structure will become more apparent. This should give

¶ "TELEPHONE *companies have a splendid chance to get official approval of a multiclass long-distance rate structure during the current shortage of telephone toll facilities. It seems strange that while passenger railroads, especially in Europe, have always been able to offer class service at premium rates, telephone communication carriers have never been permitted to do more than to differentiate the toll rate between business hours and evening or holiday calls.*"

many utilities an opportunity to bring up the question of sliding-scale, profit-sharing rate arrangements — something like the well-known Washington plan. The fact that the Washington plan itself is now being questioned by the District of Columbia Public Utilities Commission after so many years of successful operation does not alter the fact that some such quasi automatic, regulatory set-up is probably the safest and most equitable way of providing for sharp variations in revenue and operating expenses over a period of time. And—unless all signs are false—we are certainly in for just such violent fluctuations—over a *considerable* period of time.

The transit companies have a special opportunity to improve their operating position through legislative action. In a word, the opportunity lies in the fact that a great many private automobiles are now off the street. A great many more will go off the street. Now is the time to push those antiparking restrictions which would have aroused an angry chorus of outcries from private automobile users in the good old days just gone by.

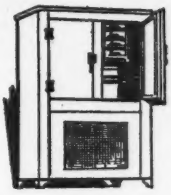
Street car motormen and bus drivers are already experiencing some relief in maintaining their operating schedules as a result of curtailed passenger car usage. They will feel it a lot more in the months to come. The point is that more can be done in the way of making this situation permanent while it does not mean so much to the motoring public.

This is not to suggest taking any unfair advantage of the American motorist while his back is turned or his attention diverted. Most fair-minded persons will agree that we have too long lagged behind in the imposition of intelligent restrictions against indiscriminate parking in downtown areas and in such cities as Washington, D. C., where the "open-air garage" (meaning parking in the street all night) has become an institution.

TELEPHONE companies have a splendid chance to get official approval of a multiclass long-distance rate structure during the current shortage of telephone toll facilities. It seems strange that while passenger railroads, especially in Europe, have always been able to offer class service at premium rates, telephone communication carriers have never been permitted to do more than to differentiate the toll rate between business hours and evening or holiday calls.

Why not move now to institute a preferred call rate, whereby quicker service is obtained for a slightly higher rate? That is the difference between telegrams and "day letter" wires—why not long-distance calls? If necessary, the premium on such calls might be largely diverted to taxes to help the war effort. WPB authorities, now busy in Washington trying to ration telephone service, should be sympathetic to such a suggestion under such circumstances. It would at least have the effect of making it possible for really urgent messages to go through ahead of others. When the war is over the retention of such a preferred toll system would unquestionably be of financial assistance to the telephone companies.

A third opportunity for improving the legal position of utilities lies in the current widespread consideration of antisabotage legislation and ordinances. A recent issue of *PUR Execu-*



Vanishing Appliances Create Utility Service Opportunity

"If you can't sell appliances, you can certainly sell service. Turn your salesmen into repairmen if it is practical. Organize a systematic check-up campaign to keep the old gas range pleasing, the old vacuum cleaner wheezing, and the old icebox freezing. And how about a Used Appliance Exchange?"

tive Information Service, the weekly Washington letter on utility matters, stated on this point:

> Utilities should consider their chances of getting protective coverage from a number of *antisabotage, quasi sabotage, and antitire-stealing bills* and ordinances which are now being framed for enactment throughout the country. If such legislation (generally in the form of increased penalties) is sufficiently broad, it would cover such losses as damage to plant facilities, street lights, glass insulators, and other items which are becoming increasingly difficult to replace. Big opportunity on this will come with the numerous special sessions of state legislatures expected to be held within coming months.

In other words, here is a chance to put a few teeth in the penalties covering acts of violence by gun-toting juveniles and so-called sportsmen who have distingushed themselves in the past by target practice on glass insulators, poles, wires, and other outdoor plant facilities.

Opportunities for Improving Employee and Public Relations

Some of the suggestions above discussed would automatically improve utility public relations—especially such items as giving instructions for blackouts. Perhaps even more can be done along this line by utilities in coöperating with the Office of Civilian Defense. Such measures as providing sand piles or locations for sand piles, facilitating the distribution of flash lights, pumps, and home fire-fighting equipment would not be too far afield for local utilities if they really want to make a hit with the public—and be remembered for it.

There is also the matter of keeping the regular personnel satisfied. As stated before, skilled man power (and some of it that is not so skilled) is going to become scarce with the increasing induction of able-bodied males into the armed services. Indeed, man power will have to give way to woman power in many situations.

The average utility company naturally wants to hold the job open for a trained employee who has been called into service. And that creates a deli-

cate employment problem. In cases where it is practicable, why not hire a relative of the employee instead of hiring a total stranger or, worse yet, bringing somebody new into the community? There are probably many cases where an employee's wife or sister or other unemployed relative could do work for the company if not the actual work performed by his relative. And, by the same token, the extra money would be that much more welcome because the male breadwinner has been called to the service. Keeping all old timers who are eligible for retirement on the job is another way out of the situation. The old timer in many cases is glad for the extra year or two of full pay. And he is likely to give good account of himself on a job that is thereby held open for the younger man now in uniform.

Intelligent supervision of such personnel practices during the critical months ahead is more than a challenge to managerial ingenuity. It is a positive opportunity for improving employee relations.

Post-war Marketing Opportunities

DURING the depression this writer was once chatting with a friend in the coffee business. This friend had resorted to the very unorthodox practice of making large unsecured loans to restaurant operators of questionable financial standing. Before the depression was over, by a series of defaults and oft-postponed foreclosures, this coffee importer found himself as much in the restaurant business as he was in the coffee business.

"Why did you do this?" I asked.

"It was simply because I wanted to keep on selling coffee," was the answer.

Furthermore, he was well able to prove his case. He had found, by actual experience, that what losses he experienced from bad loans were more than offset by the continuation of restaurants in business which used his coffee but which would have folded up long before without financial assistance. His principal condition for making the loan had been that the restaurant continue in business and continue to use his coffee product. When he could carry them no longer, he took over management, kept the old boss on the job if possible, but continued to operate—with his own coffee.

There is, perhaps, a lesson in this for public utilities that are loading up on defense specialties at an alarming rate. The aluminum plants which are springing up like mushrooms all over the country—even in the most surprising areas—are already being called "white elephants" by pessimistic prophets of the *post bellum* reconstruction era.

NOW, obviously, public utilities cannot make loans to these aluminum companies to keep them going. But they can help them to find new markets. Furniture building, home construction, trimming, and decoration —many lines that never used aluminum before or even thought about using it may be able to do so after the war. If by coöperative effort and research even during these war times an electric utility is able to bring about the creation of such *post bellum* markets for aluminum, it will be clearly to the electric utilities' advantage to do so.

Nor have some utilities been blind to this opportunity. Some weeks ago a

representative of a certain large utility system had an embarrassing, although somewhat amusing, experience along this line. He went down to southern Virginia and began to nose around and ask questions about the construction of certain fast, small boats which the Navy is developing. Some alert government officials became suspicious and the gentleman in question was politely asked for an explanation of his curiosity.

Furthermore, he had a little difficulty explaining why a man in the electric power business should be interested in small boat construction, but the fact was he was trying to look ahead to the possibility of using *aluminum for hulls*. A few years ago marine engineers would have laughed at the idea of aluminum hulls for small speed boat construction or even some larger sea craft.

Even today some of them might laugh at the idea. Maybe it is impracticable and always will be. But the utility man in question isn't overlooking any bets. He realizes that for every new market that can be found for aluminum, his company stands a better chance of retaining the business of an industry to which it is now heavily committed to supply electric power.

Aluminum is just one example. There are other materials consuming great quantities of utility service which have been boomed by the war effort and which must find new markets thereafter or languish. There are other public utilities involved besides the electric power industry. The gas industry has its specialties. Even transit and telephone companies are at least indirectly interested in maintaining the commercial integrity if not prosperity of the communities they serve when the war is over.

EVERY utility official knows his own situation best. If you happen to be such, take a quick look at your own large customer list. What companies, now heavily served by you, are entirely or greatly dependent upon war business? What chances have these companies to survive in a peace economy? *To the extent that these companies and the employees which they bring to live in your community survive in the* POST BELLUM *era, to that extent may your own public utility company have a chance to survive in the* POST BELLUM *era.* How can it be done? It is impossible to generalize, much less particularize, in an article such as this. We do know this much, however: The *post bellum* era will involve great difficulties, vast dislocations, and surprising realignments in our economic pattern. We will witness coöperative industrial action to an extent never witnessed before. Joint efforts for research, advertising, or promotion may be the difference between swimming or sinking. It might not be a bad idea for the management of every large public utility company to delegate the responsibility for making plans and keeping its eyes open along this line to some official or some committee of officials of that company—to function from now on.

The coffee man wasn't too proud to put his hard cash on the line to keep his own customers afloat. There may be a moral in this for the utilities.

LAST but probably most important of these suggestions for stimulating *post bellum* business is the heaven-sent tie-in with the government's efforts to

sell Defense Bonds and Stamps to the public. It is your patriotic duty to urge your customers to buy these essential securities and virtually every utility is doing so. But when you can connect that message with a program that will assure you of a nice backlog of domestic consumer load when the war is over, then patriotic duty becomes a pleasure indeed.

It works this way: We know that utility customers generally bought their utility appliances out of current earnings, most of them on the deferred payment plan. When they wanted a refrigerator or washing machine they saved up for a down payment and thereafter managed to keep up instalment payments out of household budgets until the appliance was paid for. Meanwhile, it used gas or electricity, which was also paid for on the monthly bill.

OK. So now they cannot buy these appliances. They want them. But for a variety of war-made reasons, they cannot get them. Instalment credit has been curtailed, appliances restricted, establishment of new homes has been checkmated, etc. But what are they doing with that money that would otherwise be spent on the purchase of a refrigerator, washing machine, etc.? Chances are they are frittering it away in a rapidly shrinking market of higher and high-priced consumer goods. A lot of it is going into entertainment, liquor, etc., and the few remaining consumer commodities which can be bought without restriction. If so, these folks are contributing to inflation. Probably they are not even getting their money's worth; and the purchase price is gone for good as far as the utilities are concerned.

WELL, that's your cue, Mr. Utility Man. You can help Uncle Sam keep this inflation-making spending money out of the diminishing consumer market. You can do this by exhorting your consumers to buy bonds *as a means of saving and augmenting the purchase price of a utility appliance for delivery after the emergency.*

Get this picture! Send your customers a bill stuffer or publish a display ad showing a beautiful up-to-the-minute kitchen with every utility appliance prominently placed. You will want to use your own language, but this is the sense of your message to your customers under this picture:

"Friends and customers: You want this modern kitchen in your home! We want you to have it. But both of us have to wait awhile until a more important job is done—Victory for American arms. But you can start buying this kitchen right now and hasten victory at the same time. Here's how. . . ."

Then would follow some sort of a schedule showing how an $18.75 bond every month for so many months will buy a refrigerator after the war. The same with other appliance items. Use such slogans as: Buy a Bond Now for a Washing Machine Then; or, Have That Washing Machine Bought for That New Little Home When He Comes Back. Impress on them the need for associating the particular bond with the particular appliance. Maybe it might be an idea to work out a complimentary "portfolio" for special appliances. In short, Uncle Sam needs that dough now, and desperately. Your business is going to need the load after the war, just as desperately. So why don't you two guys get together?

Should the State Commissions Help Ration Utility Service?

Is the War Production Board biting off more than it can chew when it undertakes to administer directly the local curtailments of utility service made necessary by the emergency?

By FRANCIS X. WELCH

THE War Production Board is a great organization. It is the result of a series of trials and errors which culminated in tight one-man control on the production side of America's war effort. All agree that is the most important side right now.

The WPB is not perfect. It will have to be shaken up and reorganized now and then, as the hectic development of a nation at war demands further changes in organization. Such is to be expected. But, on the whole, the WPB is about as representative a group of hard-working, devoted, and generally competent public servants as a democracy in arms could reasonably expect to assemble.

America can be proud of WPB because it is a veritable cross-section of national unity. It draws from all shades of opinion without regard for party or race. There are the dollar-a-year men. These are men who have left lucrative positions in private industry and, in many cases, their personal family life in comfortable homes throughout the country. They have come to Washington to work twelve and fourteen hours a day in overcrowded government office buildings. They sleep a few hours in a room of some equally overcrowded hotel, club, or boarding house.

Labor leaders, left-wingers, New Deal reformers are equally devoted, equally sacrificing, and equally represented within the WPB organization. It is the one organization in Washington today that, by and large, is making an honest effort to steer right down the middle of political extremes toward the sole objective of arming America for Armageddon.

For example, only recently the WPB Power Branch was criticized by a House committee for being unduly partial to the Rural Electrification Administration to the injury of privately owned utilities. Yet, there exists, at the

same time, criticism of the WPB branch for being anti-REA and pro-utility. Actually, both public and private ownership are well represented on the WPB Power Branch. Its chief, J. A. Krug, has no interest in this division as such. He is interested in developing power for American war effort.

CONFLICTING criticism of this sort speaks for itself. It's a dogfall. The critics stalemate each other; WPB is free to go on from there and do its job with more confidence than ever. By comparison, few other government agencies around Washington can show such a clear record of disinterested loyalty to the solitary objective of Victory. May it ever be so.

But, if we want to be intelligently critical of WPB, there is a more promising approach. If WPB fails in any respect it is not likely to be on grounds of personal corruption. That is because the WPB just is not manned by the venal type of official. Fanatical, perhaps—but dishonest, never. Maybe an excess of zeal—hardly a deficiency of it! WPB sins against public interest are more likely to be sins of commission rather than omission or studied malfeasance. They are more likely to be errors of judgment than conspiracy to pervert policy.

But, through its very ambition to do a good job, WPB may well get beyond its own depth and do a bad job, in some cases at least. That brings us to the question of rationing public utility service.

IT is difficult to draw a sharp line of demarcation between rationing and priorities. Essentially, they are the same thing; but we usually speak of priorities in the case of raw materials, semifinished and finished products still moving in wholesale commerce. When the market demand exceeds the supply anywhere along this manufacturing or wholesale line, it is necessary to install a system of preferences which we call "priorities."

As soon as the goods hit the retail dealer's counter (assuming the demand still exceeds the supply) the word "rationing" is the term more commonly used. In the case of public utility service, the WPB has so far (in its natural gas and telephone orders) used the more polite term "curtailment of service." It all means the same thing; namely, that the demand is greater than the supply and some system of preferences has to be worked out.

Rationing in this retail or ultimate consumer sense is obviously and essentially a local problem. A Federal official sitting down behind a desk in Washington can promulgate certain general rules and guiding principles. But it is the clerk at the grocery counter who hands out the sugar and other scarce food items; the man at the filling station pump, the dealer in the automobile and tire store who has the direct contact with the retail rationing problem. Whether these retail dealers are playing the game according to the rules, and whether they are correctly interpreting various aspects of the rules—these are matters which require *local* supervision. It simply cannot be done from Washington nor by any newly organized special police force operating out of Washington.

The Office of Price Administration recognized this peculiarly local char-

acter of rationing administration when it set up a series of local boards to handle rationing of tires, sugar, and so forth. In the case of sugar, for example, the OPA chief, Leon Henderson, enlisted the aid of the school teachers of the nation. He knew that the teachers know the domestic set-up in the local community better than anybody he could dispatch from Washington.

BECAUSE of the increasing variety of things that are going to be rationed, it is probably not feasible to have one rationing organization to take care of the distribution of all scarce commodities. At the present writing, at least three Federal organizations are engaged in administering different rationing regulations. The WPB has already undertaken the responsibility for curtailing gas, electric, and telephone service to the mild extent necessary so far. The OPA, as we have seen, is rationing certain consumer commodities. The Office of Defense Transportation (under the leadership of Joseph B. Eastman) is assisting WPB in the allocation of new truck sales, while the Office of Petroleum Coördinator (Mr. Ickes) is handling the gasoline and fuel oil shortage.

Now it is perfectly clear that no newly created local board of administration would know enough about the mechanics of public utility operations to make an intelligent job of rationing utility service. Such a delicate administrative job requires technical skill and experienced background. It cannot be turned over to the school teachers, nor to some community board of public-spirited citizens.

OPA, in creating a series of local tire rationing boards, had no other choice. It was a completely new and uncharted field for administrative action. There did not exist any state or local agency, already on the ground, to take over rationing duties.

But such is not the case in the field of rationing public utility service. If the OPA organization pattern were followed in rationing utility service, what would it mean? It would mean superimposing a new and expensive hierarchy of Federal bureaucracy upon an existing regulatory set-up which has heretofore functioned very well. It would mean the diversion of many man hours from necessary war effort and essential civilian service for the purpose of making out duplicate reports and figuring out jurisdictional boundaries. It would mean the creation of one more boss for the utility industries, with the danger that it might result in a case of too many cooks.

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Now the state public service commissions in most jurisdictions are already on the ground. They are skilled and experienced in dealing with utility regulation. Service rationing would be only a new phase of a problem with which they have had a long familiarity. They could handle it all right at less expense to the taxpayers and to the companies.

This does not mean, of course, that the state commissions should get in the way of the WPB or attempt to interpose their own judgments on necessary war measures relating to utility service. That is exclusively the responsibility of WPB. It is a responsibility with which no outside agency —state, Federal, or municipal—should interfere in the slightest degree. Furthermore, the state commissions will recognize the necessity for such unquestioned leadership on the part of WPB, as we shall presently see from correspondence which this writer has received from the chairmen of a number of them.

No, it is not a question of quibbling over jurisdiction. It is a question of how best to secure coöperation. It is a question of making haste in administering necessary emergency regulations by the very common-sense method of taking advantage of readily available instruments of administration.

The state commissions recognize the spot in which the WPB is placed—that it must make drastic decisions almost overnight—that it cannot waste valuable time standing around waiting for some advisory committee of state public service commissions to pass on the desirability of proposed rationing regulation. No, the day for indiscriminate advisory functions and deliberative head scratching is past. The day for action is present. The state commissions only want to know what they can do to help. And a question WPB must determine is whether it can get ahead faster without such help.

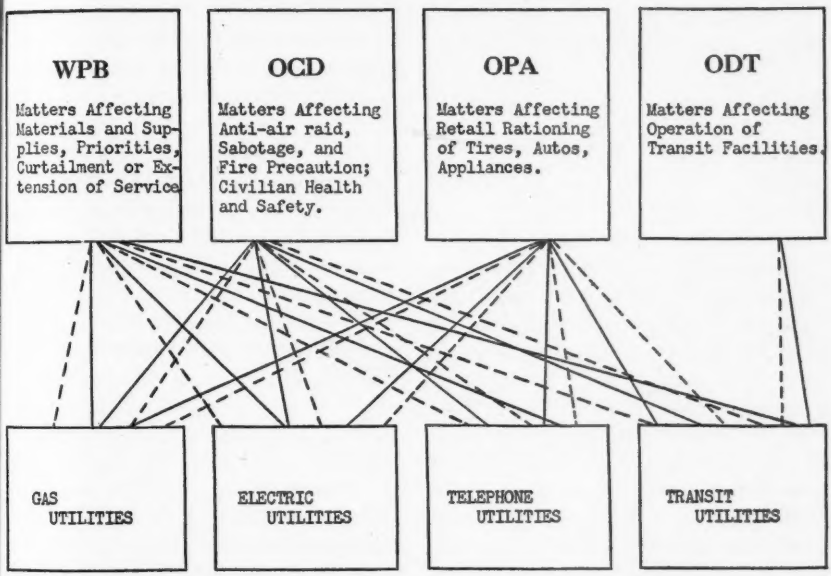
The February 20th issue of *PUR Executive Information Service*, a weekly Washington letter on utility matters, stated the matter quite succinctly as follows:

> State commissioners realize that WPB must act promptly and thoroughly—has no time for consultation or argument. They say they would not stand in the way—only want to help if told what to do. But state commissions are not even mentioned in the WPB natural gas restrictive order and the WPB telephone rationing order . . .
>
> State officials say that WPB could have coöperation of the state commissions for the asking. Probably WPB will eventually have to enlist state aid in inspecting, enforcing, and supervising utility service rationing orders. Lack of foresight in failing to consider this angle may prove WPB administrative blunder.

It will be noted from the foregoing quoted passage that the two WPB rationing orders did not even mention the state commissions by name. Such recognition would at least have been diplomatic.

As a matter of practice, however, WPB did see that seasonable notice of these orders was dispatched to the various state regulatory commissions, together with a general plea for coöperative action. More recently, a representative of the WPB conferred in Washington with a committee of the National Association of Railroad and Utilities Commissioners as to means for improving coöperative action between the Federal and state agencies in this field. Such perfunctory amenities were about as far as any

Present Federal War Organization
Contact with Utilities



Legend:
——— Indicates instructions, orders, investigations, and interpretations moving *from* Federal agencies.
– – – – Indicates compliance, inventory, and other reports, inquiries and appeals moving *to* Federal agencies.

movement in this direction had gone when these lines were written.

In other words, it is quite obvious from the language of the WPB orders issued to date (on gas and telephone service, respectively) that WPB feels it can handle this job from Washington without any assistance from the state commissions. If so, WPB may be in for some shocks; and the war effort is not going to be helped thereby.

It is a fair question to ask at this point *why* the WPB cannot handle everything from Washington? *Why* cannot the WPB simply lay down general rules and leave enforcement to be a matter of direct contact between WPB and the public utility compa-

nies? To answer those questions we have only to go to the orders themselves.

First of all, how is WPB going to tell whether public utilities are actually obeying the orders? As hinted above, it would be an impracticable expense to hire a corps of special inspectors—strangers in the various communities they visit—to run all over the country for the sole purpose of policing these orders.

We may reasonably expect pretty nearly 100 per cent voluntary coöperation from the public utility companies, assuming that they understand the orders. But there are bound to be cases of misunderstanding, misinterpretation, and downright ignorance, especially in the case of small backwoods concerns in the hinterlands. Almost any utility equipment manufacturing official could give you instances, offhand, of the amusing naïveté of some of their operating utility customers—such as the one-man electric company which persists in ordering equipment items out of a 3-year-old catalogue with all the confidence and impatience that marked the buyer's market of 1939.

The state commissions know utilities in their jurisdiction. They know the men and women who operate them. In many cases they know them by their first names. It would be a comparatively simple thing for them to make a rigid check-up of compliance on any order the WPB cared to get out—after first seeing that every company under its jurisdiction was properly informed. WPB could receive these compliance reports within a week, if necessary. It could then rest assured that compliance in such and such a state was 100 per cent, or 95 per cent, or whatever the case might be. Why does WPB turn its nose up at such a valuable instrument of administrative assistance?

And suppose a public utility company refuses to comply with a curtailment order—not outright defiance, but simply hems and haws and argues. Is the Federal government in a position to secure prompt and effective enforcement in such a case? Let us see. The WPB gasrationing order (L-31) issued February 18, 1942, contains a section on violations. This section says that any person who wilfully violates the provisions of the order "may be prohibited from delivering or receiving gas or any other material subject to allocation."

Now how in the world would that cure the situation? You stop the utility from doing business—then what? It might penalize the utility but it would penalize its customers a lot more. It might seriously embarrass the war effort if such foolish steps were taken. We can assume that the WPB would never resort to such silly action. That type of enforcement is ridiculous on its face.

The WPB gas order further hints that additional action might be taken, "including a recommendation" for criminal prosecution. Under the many war-time emergency laws the Justice Department could eventually find one under which the Attorney General could proceed in Federal court. The culprit would finally be disciplined by fine or imprisonment, or both.

But such deliberative action is scarcely of a quality commensurate with the importance of these emergen-

cy measures. The public utility that violates these regulations *must be stopped at once*! The state commissions could readily jump into such a gap and secure immediate enforcement by mandatory injunctive action, which practically all state public utility regulatory laws provide. Incidentally, the WPB telephone rationing order of March 2nd (L-50) does not even contain a section on violations or penalties.

So much for violations. What about interpretation? In the WPB order L-50, telephone companies are ordered to discontinue the installation of extension phones in residences "except when such extensions are necessary for the use of those who are charged with the responsibility for the public health, welfare, or security." Who is to decide this? Here is another of those questions which cannot be decided in every instance from a desk in faraway Washington, D. C.

We may assume from the outset that the telephone companies do not want to take the responsibility for curtailing service to their own customers. But the state public service commissions are in a position to handle this matter quickly and easily, in the first instance at least.

The state commission could check an application by a doctor, a sheriff, or some other prospective subscriber that would fall under the category of eligibility. After a brief examination of the merits of the case, it could render a decision as to whether an extension phone ought to be allowed. If the customer is dissatisfied he might appeal to WPB in Washington. But the chances are that such appeals would be few. By the same token, the WPB, which certainly has enough more important matters to take care of, is relieved of many headaches that accompany such routine administration.

If a serious question of policy developed, WPB could get out a supplemental interpretation of what constitutes public health, safety, and so forth. It has frequently issued such interpretations in the past with respect to priority orders. Such supplemental interpretations would guide and be binding upon the action of the state public service commission.

Again, there is the question of checking inventories of equipment and materials, which has been and will continue to be the subject of such WPB orders. Of course, public utilities are already sending in periodical reports to WPB on the status of their various inventories of equipment and supplies. But how in the world can WPB actually check how many meters such

¶ "When *these rationing orders become more intensive, the need for more* SELECTIVE *application will become more necessary. It is all very well for the WPB in Washington to formulate guiding principles; but they will have to be broad and elastic, almost in proportion to their drastic effect. Nothing could be more harmful than to have some Federal government body go off half-cocked with blunderbuss orders in the form of industry-wide blanket mandates.*"

a company has on hand, how much wire, how much of this, that, and the other?

The state commissions have been doing work along this line for years. It might not even involve as much paper work as an extra carbon copy of the report which the utility companies send to WPB. It might only involve a request by the WPB to a state commission to make a check in cases where there was reason to believe something might be wrong. The utilities would appreciate soon enough the fact that the state commissions were on the job and would be correspondingly careful.

There is hardly space in an article such as this to examine the full scope of possibilities for "coöperative" administration by the state commissions with the WPB. Such items as the existence of stand-by fuel facilities in the curtailment of natural gas. Such items as the periodic growth or diminution of various classes of consumption and patronage. Such items as the physical progress of plant construction or outside distribution facilities. These are all tangible, down-to-earth investigations of fact which are bound to affect the policy of curtailment of utility service. They can only be intelligently dealt with by experienced local supervision.

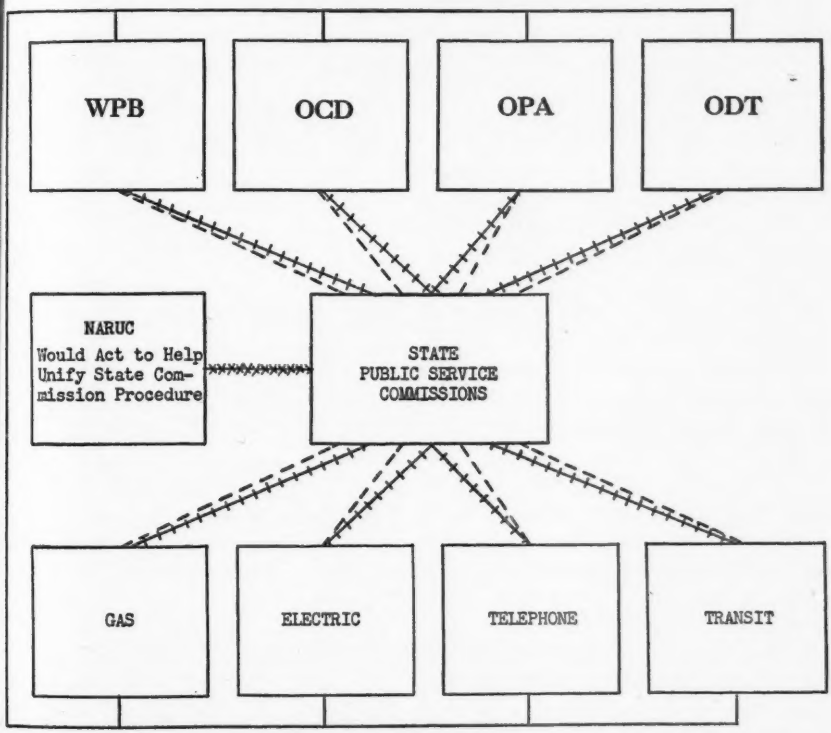
As we have seen, the WPB rationing orders have, so far, been quite mild. But as the war emergency bites deeper, the rationing restrictions are going to become more drastic. And as they become more drastic, the need for intelligent local supervision will become more pressing. It may well be that the WPB will finally be compelled, by force of necessity, to enlist the active and avowed assistance of the state commissions. By that time the coöperative spirit of some of the state boards might be dulled by WPB's present attitude of ignoring it.

As these lines are written, there are rumors that the WPB is planning to cut off *all* new telephone subscribers except certain preferred classes eligible for rationed subscription. Similar steps may be in order for gas and electric consumers. Surely we will have more of these restrictions.

When these rationing orders become more intensive, the need for more *selective* application will become more necessary. It is all very well for the WPB in Washington to formulate guiding principles; but they will have to be broad and elastic, almost in proportion to their drastic effect. Nothing could be more harmful than to have some Federal government body go off half-cocked with blunderbuss orders in the form of industry-wide blanket mandates. For example, consider an order directing all telephone companies to tear out all extra telephone extensions from residential subscribers. In some cities this might be desirable. In other cities the supply and service situation might be such that it would be positively an expensive nuisance. Such an order might well put some companies to needless expense of removing equipment that is not required or could not be used for new extensions, even if they were required, without expensive rehabilitation.

FINALLY, there is the possibility that rationing utility service may reach the ultimate step—rationing domestic consumption. We don't think it will right now. Great Britain, under even more pressing circumstances than our

Proposed Federal War Organization
Utility Contact via Commissions



Indicates instructions, orders, investigations, and interpretations moving from Federal agencies and cleared through state commissions.

Indicates compliance, inventory, and other reports from utilities as required.

Indicates appeals or other direct Federal-utility contact in exceptional cases.

own, has found rationing utility service on the consumer's premises to be impracticable. But if it is a long war, who can tell what will happen? Here is where it is difficult to see how the WPB can avoid calling in the state

commissions to act as WPB agents or something like that. The commissions will be needed in policing customer compliance with drastic service curtailment orders.

Indeed, it is quite likely that, in some communities, the congestion of telephone switchboard traffic may eventually reach such proportion that some arrangement will have to be made for curtailing the holding time on local calls. If local calls can be cut down in time and frequency to a reasonable proportion, telephone subscribers might actually receive just as good if not better service than they received before, even though it may be necessary to systematically regrade (a polite word for "degrade") present individual line service to party-line service.

Such an arrangement would obviously call for a certain amount of supervision of subscriber calls, which is a delicate operation in itself. Here is where the company could make effective use of the state commission's authority, where disciplinary measures were indicated. It would be the state commission—not the telephone company—which would dispatch a little note to old Mrs. So-and-So and tell her, politely, that it is in the interest of national defense that she stop gabbing all day about nothing with her neighbor who lives only across the street from her.

In other words, there is a splendid opportunity here not only for the state commissions but for their central organization, the National Association of Railroad and Utilities Commissioners, to serve the best interests of the nation. Heretofore, these state commissions have seemed to be steadily dropping out of the picture, eclipsed by the war emergency which tends to federalize everything.

UNCLE Sam cannot do everything and do it well. The more jobs we find for the state and local governments to do, the better it will be for Uncle Sam and everyone else. State commissions have been sensitive about the past regulatory trend toward Washington. Here is their chance to get in some effective pitching.

How do the state commissions feel about this? This writer corresponded with a number of them recently—to be exact, with the chairmen of seventeen state commissions and the District of Columbia, affected by the WPB natural gas rationing order.

To a man, the chairmen who wrote to me on this situation pledged the whole-hearted coöperation of their commissions. To a man they conceded that Federal interest in securing necessary economies of operation from the public utilities of the nation was paramount to any regulatory right of the state or local government.

It was quite clear that none of these state commission chairmen thought of the matter in terms of quibbling over jurisdictional niceties with the Federal government. It was quite clear that their sole concern was whether a better job could be done with or without the assistance of the state regulatory boards. This attitude is expressed in the following passage extracted from a letter of Hugh White, president of the Alabama Public Service Commission. He said:

> The WPB has already advised our commission as to the limitation order L-31 relating to curtailment of the consumption of natural gas and furnished us with copy of such order. We have been requested to co-

Rationing Requires More Regulation

"As we have seen, the WPB rationing orders have, so far, been quite mild. But as the war emergency bites deeper, the rationing restrictions are going to become more drastic. And as they become more drastic, the need for intelligent local supervision will become more pressing."

öperate with the WPB in its efforts to administer the regulation under such order and we will be glad to do so.

This policy was followed several months ago with respect to the curtailment of power in our territory provided by public and private power utilities.

If and when the order rationing telephone service is issued by the WPB, we anticipate it will follow the same policy. I do not believe that these regulations could effectively be administered through local rationing boards such as the OPA sugar-tire-auto setup.

If any such WPB regulations conflict with positive orders of our commission, our orders, under the law and as a matter of common sense, must yield to the WPB regulations.

A similar attitude was expressed by Steuart Purcell, chairman of the Maryland Public Service Commission. His willingness to coöperate is expressed in the following language:

> This commission is ready to coöperate fully with Federal authorities in making effective, with the least possible inconvenience to the public, such rationing of the services which we regulate as may be found necessary to meet war needs.
>
> We believe the state commissions are particularly well prepared to administer any such restrictions intelligently and economically and that, when willing to assume such obligation, there should be no need for creation of Federal local rationing boards.

Again, there is the following wholehearted desire to coöperate voiced by Chairman John D. Biggs of the Illinois Commerce Commission, as follows:

> Under the present conditions of emergency, this commission considers that it has a duty and an obligation to do everything reasonably required to promote matters affecting national defense, and is endeavoring to coöperate with the established governmental agencies in such matters.

On the other hand, there are state commission chairmen, equally desirous to coöperate with anything the Federal government or the WPB sees fit to do, but quite frank in expressing doubts as to whether the WPB is on the right administrative track to date. Some hint of this is seen even in the above passages quoted from letters of Chairman Purcell of Maryland and President White of Alabama. Some other state chairmen spoke so positively about the "grave mistake in policy" WPB is making that they felt constrained to request that their cor-

respondence be kept in strict confidence.

One forthright reply by a state commission chairman, who has evidently been doing some serious thinking along this line, comes from Chairman Frederick F. Eichhorn of the Indiana Public Service Commission. He stated:

> Your inquiry of February 18th relative to the orders restricting use of utility service appears to me as one that might well be seriously considered by all members of state commissions. The fact that these regulations are in direct conflict with state statutes, of course, is important. However, my understanding is that during the last war matters of this kind arose and it was held by some courts that war-time conditions arising thereunder were not sufficient justification for state commissions refusing to require utilities to extend service. But, the fact remains, these cases may still arise and will, of necessity, have to be decided and that they must be decided by state commissions. It would seem to follow from this that coöperation with state commission in the promulgation of such orders as well as the policing which must follow, would be the ideal, efficient, and satisfactory way of handling. . . .
>
> It is the opinion of the Indiana commission that coöperation is essential and should be had.

Likewise, Frederick Stuech, chairman of the Missouri Public Service Commission, has this to say:

> I have asked the other members of the Missouri Public Service Commission to read your letter and express an opinion based upon the questions which you have asked. It is our consensus of opinion that:
>
> 1. The distribution of service and the protection of resources are very vital to the Victory Program, and state regulatory bodies ought, where possible, to coöperate and aid in every way possible the integration of the war effort that the earliest complete victory may be had.
> 2. We feel that it is a mistake for the Federal government to undertake to adopt the regulation of distribution of service and protection of resources to the exclusion of the regulatory organization of the various states for the reason that such state organizations have a presently existing personnel much more capable of dealing with the various problems than will a personnel of the Federal authority which has been hastily set up. For example, our engineer in charge of the Gas and Water Department of this commission has been associated with this commission's regulatory powers over the distribution of gas for more than twenty-five years.
>
> An emergency personnel set up by the Federal government which undertakes to take over the regulatory powers of the state regulatory bodies will, in our judgment, bring us to considerable grief later on.

The attitude of the California commission in going ahead and laying plans for the conservation of utility service under emergency conditions, long before the Federal government was even organized to do anything about the matter, has already been analyzed in these pages (PUBLIC UTILITIES FORTNIGHTLY, February 26, 1942, page 306). As an example of what a state commission can do in intelligent planning of emergency regulation, the accomplishments of the California commission to date could certainly qualify.

FINALLY, Chairman Walter R. McDonald of the Georgia Public Service Commission has felt that this matter was important enough to go beyond the orbit of his own commission and to seek some expression of unified policy from commissions of sister states. It was as the result of the initiative and interest of such state commissioners as Chairman McDonald that the National Association of Railroad and Utilities Commissioners has taken steps and is still taking steps to explore possibilities for further coöperative action between the state and Federal agencies.

The chairman of the Georgia commission likewise caused to be sent to "all public service commissioners of the ten southern states" a convocation notice of the meeting to be held in Atlanta beginning February 27th to con-

sider, among other things, the following:

> As you know the power section of the War Production Board has recently issued limitation order L-31 involving at least four of our states and we can look for similar limitations with respect to other utilities service, especially electricity and telephone. Certain phases of such limitation must be handled on a nation-wide basis, but much of the enforcement can be efficiently and economically handled through existing state agencies, and closer coöperation in counsel in advance of promulgation of such orders would result in better understanding and coöperation on the part of the public.

And the WPB is not the only Federal war organization that will need the active coöperation of the state commissions. The Office of Defense Transportation and the Office of Civilian Defense will find a useful local aid to the administration of their respective functions if they will but explore the possibilities.

THERE is the matter of standardizing air-raid and other civilian defense precautions of public utilities. How will OCD know, assuming that it wants to know, whether the essential and vital public service companies throughout the nation have actually taken precautions against air raids, sabotage, and other matters? And where companies want to take precautions, what better centralizing device for distributing and standardizing effective information along this line can be found than in the state public service commissions?

In Great Britain it was found necessary for utilities of different types to pool their repair, maintenance, and demolition crews for purposes of mutual defense against enemy action. Are the state commissions not in an ideal position to organize such pools, not only in one community but in all communities throughout the states? Projecting possibilities further, through the NARUC such organized effort can be created not only in one state but in many states.

IN short, the state commissions and their national organization, the NARUC, constitute a "natural" set-up for coöperative action with the Federal government. Every day the WPB and other Federal agencies fail to take advantage of this natural set-up is a day wasted in securing the most complete and effective emergency regulation of utilities. The state commissions are ready. The next move is up to the Federal agencies and it is later than we think.

"FREE *enterprise made America and we all know that, except for the brakes put on business during these last ten years, we would have been better prepared to turn to military production when the emergency arose. We would have had greater inventiveness, ingenuity, and expansion. Our idle billions of dollars would have been a stimulus instead of a problem. In all probability, stockpiles would have been built higher than they are, and in a dozen other ways there would have resulted less need for the American people now to pull in their belts and do without so much they want and need.*"

—WALTER D. FULLER,
President, Curtis Publishing Company.

Aluminum Output Reaches For New Power

As Americans are called upon to "raise our sights" in stepping up war production, the problem of finding more electric power and gas for more aluminum and magnesium becomes increasingly acute.

By T. N. SANDIFER

Between now and early 1943 at the latest, aluminum production in the United States is scheduled to attain a peak capacity annually of 2,100,000,000 pounds. The increased output represented in building to that total per year is roughly equivalent to providing the war industries of the United States, within the next twelve months or so, with two aluminum industries of the 1939 size.

This increase, just decided upon by the War Production Board, entails an expansion program to be pyramided on present facilities capable of producing 850,000,000 pounds of aluminum, and an initial expansion adopted early in the past year, and now under way, of 640,000,000. It contemplates a second expansion of 640,000,000, and this, in turn, it has just been revealed, will impinge on the nation's power facilities in a way that will only be realized by the public later.

Briefly the new increase in aluminum production will alone call for about 1,000,000 kilowatts of electricity constantly available for operation of plants and related facilities. Further, this enormous expansion of new plants very likely will drain power resources not hitherto involved in aluminum production to any extent, if at all—for reasons to be stated. Coupled closely with this program, also, is a plan for stepping up magnesium production from a level of 33,000,000 pounds in 1941 to 725,000,000 by the time the aluminum production peak is reached. The latter program holds vast new potentialities for industrial demands on the national gas supply.

Contracts for the larger part of the augmented aluminum production facilities—the ingot production at least—have been let or are rapidly being let, and construction is under

way. Here, however, the government has encountered a power problem that might discourage any private venture in such a field—the fact that this new construction is now reaching into high-cost power. This may explain to a large extent why the current expansion of plant facilities is almost entirely, according to information, a government projection. Available power is inseparably coupled as a basic consideration with aluminum ingot production. Up to now, in expanding production for this metal, it was possible to couple new plants with low-cost power.

In meeting the demand for aluminum necessary to build 125,000 aircraft for the armed services of the United States and our associated nations, the country has been very thoroughly combed for blocks of low-cost power in sufficient size to meet such needs. The low-cost power available for this purpose for both this year and next, according to informed sources, has now been absorbed in operations and additional facilities already committed.

From here out, accordingly, the prospect is that new aluminum ingot production will be laid out in areas that, from the practical standpoint of private operation for profit, would undoubtedly be ruled out under other conditions. When the new aluminum program was decided upon, however, the War Production Board adopted a policy that will govern, in all probability, all future war production of the government—a policy laid down by William Batt, chief of the materials branch of the WPB, in these words:

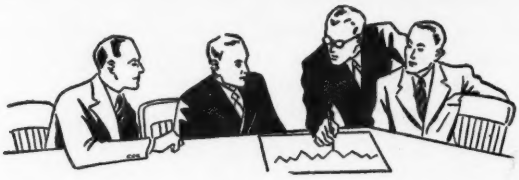
> In the construction of facilities to increase the available supply of critical materials, it will be the policy of the requirements committee to give secondary consideration to the dollar cost of the additional facilities, and to give primary consideration to the quantity of scarce materials needed in their construction and the consumption of time needed for the facilities to start production.

Elaborating this declaration, Mr. Batt commented: "In this whole expansion program one of the determining factors is the question as to whether you can get enough material. There is no question about having enough money, but whether you can get enough materials; that is the critical question."

EACH of the aluminum plants so far set up, using low-cost power available at the time, has been one that would be judged efficient by peace-time standards, in that it can be operated economically either in the present emergency or in normal times; but plants located now are, it is expected, to be laid out as admittedly high-cost plants. For that reason the hang-the-cost idea will be more and more to the front, and necessarily in this case.

The relationship of power to aluminum cost is fairly well known, but can be expressed, according to one source, as about one cent additional for each added mill of power cost. Plants hitherto have been sited in areas affording them power at 2, 2½, or 2¾ mills. Plants face the prospect in some areas of power cost ranging from 6 up to 7 mills; yet some such areas do afford blocks of available power.

The problem the government must decide is primarily one of power cost, if the long view is taken. Considering only war factors, the policy just outlined would indicate that the plants will be located wherever power is available, at whatever cost, and in conformity to strategic or tactical possibilities, such



Ratio of Power Use to Aluminum Production

"THE relationship of power to aluminum cost is fairly well known, but can be expressed, according to one source, as about one cent additional for each added mill of power cost. Plants hitherto have been sited in areas affording them power at 2, 2½, or 2¾ mills."

as the liability to attack. By availability, in the absence of official clarification, it may be assumed is meant sufficient power twenty-four hours per day, after all possible local demands already permanently fixed have been met, with a due margin for any sudden emergency demand that might have to be supplied.

The power required in the new program involves both that for ingot and also for fabricating facilities. Due to military and other reasons the locations decided on, or about to be determined, have been omitted from any official announcements. However, it can be stated that wherever such plants are found there is inherent in the fact some possible civilian dislocations.

One official put the matter rather euphemistically: "I think undoubtedly this is one of the first real contributions of civilian life, to supply the current for these war efforts."

The same official conceded that while it does not necessarily mean a raid on power available in such areas for the civilian population, "It may."

THE figures on such inroads doubtless will be calculated at a later date, because there is already in the wind at Washington some idea of rationing power and gas consumption in certain areas when it comes to such a stage that rationing appears necessary to meet war production power needs. There is, of course, rationing now, to the extent that new consumers have been shut off in some sections, and expansion of existing installations barred in others.

Meantime, it can be hazarded that the extra power, the "mill" already under discussion, is going to come out of civilian consumption, or at least a major part of it will. Analyzing where this mill may be derived, as a spokesman did at Washington, it does not necessarily mean that the housewife has to give up the electric iron, or the vacuum cleaner, or other electrical appliances. But it may mean a curb on power for what are, or may be, classified as nonessential industries.

For a practical illustration the cur-

tailment program in the Southeast last fall may serve; in fact, there is good reason to believe that the civilians in that sector may one day be joined by those of other areas in the experiences that marked the power curtailments of the period. It may almost be predicted that the aluminum expansion now under way almost certainly will demand, sooner or later, either temporary or extended restrictions in given areas on civilian power consumption among present power users, as distinguished from potential customers of utilities who are for the time barred from obtaining service through war expedients.

Where such inconveniences, or even sacrifices, are likely to be asked will best be indicated when the list of plant sites is finally made public. There is some expectation that it will be issued when the final choice of sites has been completed and construction under way. Nor has there been any indication as to tangible reductions of power to be sought among civilian users.

THE question already is rife, and as yet unanswered to the satisfaction of many civilians, as to whether the so-called "War Time" or, as some term it, "Roosevelt Time" really serves its avowed purpose. Whether it does or not, the future curtailments involved in the expanded production under discussion may take the form, conceivably, of further advancing the clock nationally or in a given area, or in arbitrary current reductions at given times in a specified locality or geographical power net zone. There are a number of ways of meeting the problem.

Apart from the power needs anticipated for providing aluminum, there now comes the further requirement under the magnesium production increase referred to. Production of this commodity in this country ran to 33,000,000 pounds in 1941. It is now to go from this rate of approximately 2,500,000 pounds per month to 60,000,000 pounds per month. Of the total production facilities, those for 54,000,000 pounds have been completed and some 400,000,000 are under construction.

Two methods of production are being or will be utilized in this production; the larger part by electrolysis of magnesium chloride, and the other using the carbo-thermal process controlled under patents in use at the Permanente plant in the Southwest. What the War Production Board is still seeking is a process calling for less current, in view of the already heavy power demands.

These two methods are the result of research, including studies by the National Academy of Sciences, as well as others. Nevertheless, contracts have been awarded six companies in the United States for design of plants to produce magnesium by the ferrosilicon process, with a combined capacity of 157,000,000 pounds annually, all but one of which plants will use gas instead of electricity as power.

The authorities are evidently quite pleased at getting this output without the further drain on electric power that might otherwise be involved, and incidentally the plants can be brought into production in a shorter time. As a sidelight, the gas required for such operations, it is stated, must be sulphur-free gas, which indicates that such plants must be located away from the seacoast. The companies with which contracts have been let for design of

these magnesium plants include the Union Carbide & Carbon Company, or the Electro Metallurgical Corporation, its parent; Ford Motor Company, National Lead Company, American Metals, Permanente Corporation, and the New England Lime Company.

As a further sidelight, referring to aluminum capacity to be available, a commitment has been made to Canadian interests to supply between 450,000,000 and 500,000,000 pounds of aluminum to the American government for augmenting further its war stocks in the coming year.

The Defense Plant Corporation, an American government agency, has made long-time contracts with Canada to take such output. This will necessitate expansion of Canadian facilities, which will be financed, it is understood, through funds derived from sale of aluminum to this country. The Canadian government likewise is said to be subsidizing such Canadian expansion.

In this country, the expanded aluminum production contemplates using lower grades of bauxite, as well as premium grades, as needed. An additional 1,500,000 tons of bauxite must be mined annually for conversion into alumina for manufacture of electrodes for the increased output. The total expansion cost is placed somewhere about $350,000,000 for the last 640,000,000-pound program.

The bulk of aluminum production, that is, ingot aluminum, will be in the hands of the Aluminum Company of America, with Reynolds Metal Company, a government-subsidized organization, taking the secondary share. Fabricating facilities will be utilized wherever available.

The power consumption implications of the final 640,000,000-pound aluminum production increase can be gauged, in the absence of specific figures, by some dimensions as to operations involved. It will be necessary, as stated, to mine an additional 1,500,000 tons of bauxite, which in turn must be converted into 1,300,000,000 pounds of alumina; new plants, number not stated, will be necessary for manufacturing carbon electrodes, and to supply all the electrolytic plants; facilities will be needed for converting about half the aluminum produced into sheet metal; plants for production of synthetic cryolite and aluminum fluoride, besides operation of equipment for casting, extrusion, forging, and constructing the latter.

Recalling the controversy as to whether there has ever been a shortage of aluminum, and, incidentally, of the power involved in its production, the consensus at WPB now is that there never was an actual aluminum shortage as such; there may have been displacements, and there may have been times when a given aircraft project could not get the exact forms of aluminum it wanted, but for essential requirements it was there.

It is not guaranteed even now that the tremendous effort just launched, which at its peak will far exceed any known combined production of aluminum by enemy countries, will meet all aircraft requirements at any given date, or all other war requirements, without some adjustments. And there is still not going to be any for household pots and pans. In view of threatened inroads on electric current and gas for civilian use, perhaps it is figured the pots won't be needed.

Wire and Wireless Communication

MUCH interest was attached in financial circles recently to reports from Washington to the effect that the United States, in furtherance of the good neighbor policy, would finance the purchase of communication facilities in South America. According to reports, such a plan would be made operative either by having South American governments, with our financial aid, take over facilities, or have private communications concerns such as the International Telephone & Telegraph Company handle the arrangements.

The move is designed to remove completely from Axis control any Latin American telephone, telegraph, and radio facilities. The International Telephone & Telegraph Company, an American-owned enterprise, has been instrumental in pioneering much of the telephone development in South America.

* * * *

LEGISLATION permitting the merger of Western Union and Postal Telegraph companies was scheduled to be introduced in Congress early in April by Senators White (Republican, Maine) and McFarland (Democrat, Arizona).

The bill, it was learned, probably will be more liberal in its protection of labor than was previously expected. Indications were that the measure would guarantee all employees above a certain tenure —possibly five or ten years—the same jobs that they have now and that many other employees would be guaranteed an equal salary even though their work was changed.

The bill merely will permit Postal and Western Union to merge with the permission of the Federal Communications Commission. Under it two new corporations could be set up, one a merger of the domestic facilities of both companies and the other a merger of the international facilities of both companies.

Senator McFarland said he hoped to get hearings started on the bill at once, although there was no indication that the Senate Interstate Commerce Committee would get around to the measure until late in the spring or early summer.

* * * *

THE Rules Committee of the House of Representatives was expected to take final action some time around April 1st on the resolution of Representative Cox (Democrat, Georgia) to investigate the FCC and radio regulation generally. Supporters of the Cox resolution claim that a majority of the committee would favor the probe. If authorized the investigation would probably carry an appropriation of $25,000. However, approval of the resolution by the House membership, even if recommended by the Rules Committee, was believed to be in doubt because of the strong opposition of the administration.

Appearing at hearings on the resolution before the Rules Committee on March 18th, Chairman James Lawrence Fly of the FCC hotly denied that the

FCC maintains a Gestapo to "beat down and cow" its opponents. Testifying on the Cox resolution, Fly said "I certainly object to the type of investigation you have in mind" when Cox asked if the commission had sought to bring "pressure" to block the projected inquiry.

The committee arrived at no conclusion on Cox's resolution after having heard the FCC chairman for the second time in less than a week. It had not finished questioning him when it adjourned without setting a time for another session.

Cox, who did most of the questioning, asked Fly if the commission "maintains a Gestapo used to beat down . . . and cow . . . everyone who might differ."

"That's entirely false, sir," retorted Fly, who explained that the commission maintained a force of nine investigators to handle its investigatory work.

* * * *

THE independent telephone companies are not disposed to tie themselves up tight on any form of concurrence in toll compensation just because the name "Federal Communications Commission" appears over the form of the statement. This was seen in the recent action of the Nebraska Continental Telephone Company in filing an application with the FCC for permission to file concurrences which do not conform to the present requirements of the FCC.

The present form of concurrence which the FCC asks all telephone companies to file in connection with toll business handled jointly with the Bell system makes this requirement: The concurring carrier assents to, adopts, and concurs in the tariff prescribed, "together with amendments thereof and successive issues thereof which the named issuing carrier may make and file."

The view taken by the Nebraska Continental Company was that the execution of such a concurrence is probably beyond its own corporate powers (*ultra vires*). Such an execution, the Nebraska Company alleges, "has the legal effect of transferring the conduct of at least certain of the affairs of one corporation to the board of directors of another corporation for an indefinite period without limit to the extent to which the concurring carrier's operations and revenues may be affected and without even so much as notice prior to the taking effect of such acts."

The Nebraska Continental Telephone Company accordingly requested that the FCC either accept concurrences with the objectionable language eliminated, or accept a concurrence with suitable provision for the notice of any change—such notice to be given to the concurring carrier in advance of the filing of such changes with the commission, with suitable opportunity for the filing of a notice of nonconcurrence prior to the effective date of any amendment.

The present procedure provides for sixty days' notice of cancellation of concurrence.

There is evidence that the Nebraska Continental Telephone Company is not the only independent company which is concerned over the form of concurrence required by the FCC on joint toll business with the Bell system. On March 18th the USITA notified the FCC that it approved of the position taken by the Nebraska Company.

* * * *

THE war has opened many opportunities for trained women in the communications field. Such was the message conveyed in an address by Commissioner Ray C. Wakefield of the FCC before the Institute on Women's Professional Relations. The address was made in Washington on March 21st. Commissioner Wakefield stated:

> The Federal Communications Commission recently sent its assistant chief engineer, Gerald C. Gross, to survey existing communications in England. Mr. Gross brought back many accounts of striking developments, much testimony concerning the absolute necessity of an efficient communications system to a nation at war, and tales of personal heroism in the communications service. But nothing that he saw or heard impressed me more than his account of the major rôle now played by women in radio, telephone, telegraph, and allied means of communications.
>
> In the telephone industry, for example,

women operators were universal. That, of course, was to be expected. But women were also active in the technical jobs. They served as maintenance men, as office supervisors, and, when bombing or other causes made a break in a telephone line, women drove the repair trucks and served on the repair crews.

In radio broadcasting, the same was true. We have come to expect women in the broadcasting field—as announcers, as script writers, as program directors, and so on. Those activities, Mr. Gross reports, have vastly expanded in war-time England—but women have not stopped there. You will find women also on the technical side—standing at the controls, serving as assistant engineers, as program monitors, and in a variety of technical and maintenance positions.

The primary purpose of all this feminine activity, of course, is to free the men who formerly performed these duties for service in the uniformed forces. But evidently women's rôle in British communications has gone beyond even this. When you turn to the uniformed forces themselves, you find women everywhere active in maintaining communications.

Commissioner Wakefield commented on the increasing use of a new kind of antiaircraft device known as the radio locator. Large proportions of the operators for this new device are women.

THE need for more trained women operators brought on by the emergency in the United States also drew comment from the FCC member. He stated:

> Unfortunately, in time of war the demand for trained communications personnel comes simultaneously and with unabated urgency from two fronts. The normal media of communication — telephone, telegraph, radiotelegraph, and even to a certain extent radio broadcasting—must operate at even higher efficiency and carry a far heavier message load than in time of peace. And that means more men, or perhaps I should say more men and women. Simultaneously, however, the armed forces have an even more urgent need for the same trained personnel, and, of course, make heavy inroads into the technical staffs of the communications companies.
>
> In the manufacturing field, civilian goods can be curtailed to make available the men, materials, and plant needed for military production. In many other lines of activity the same is true. But in the communications field, a vast increase in specialized military personnel cannot be procured by curtailing civilian activities; for civilian communications are also an essential component of the war effort, and must be expanded simultaneously with the military expansion.

By the end of 1940 major telephone companies in the United States employed more than 300,000 people, of whom 60 per cent were women. Because of loss of personnel through selective service, old age, and other causes, the Bell system (which employs about 90 per cent of all telephone workers in the United States) hired 131,000 new people during 1941—a net increase of 57,000. During the same year 5,700 Bell employees left the company to enter the armed forces—about 2,000 technical men to the Army Signal Corps alone. Commissioner Wakefield conceded the difficulty in filling new technical jobs with women because of the lack of previous training, but he continued:

> . . . as the shortage of trained technical personnel becomes more acute, the preference for men is bound to become weaker in technical as in other fields. Even hard-bitten executives who have been heard to say that they'd rather close up shop than hire a woman for a responsible position, will succumb to the situation when they need an employee with a given technical training—and the only qualified applicant is a woman.
>
> Designing courses in telephony for women should be a fairly simple task because of the highly centralized nature of the industry. With 90 per cent of all telephone employees working for the Bell system, it is obvious that any training courses in telephony should be closely geared to the needs and anticipated needs of that system—with one eye always fixed, of course, on the probable future needs of the armed forces themselves, in the event that we too find it necessary to employ women auxiliaries to our armed forces on the British pattern.

Of course, not every girl has the qualities which would make a competent communications technician. The FCC member mentioned vocational interest tests developed by Dr. Strong of Stanford University as one of the methods being used to give the chosen candidate a reasonable assurance of success.

* * * *

AMERICAN Telephone and Telegraph Company has been granted special authority by the Federal Communica-

tions Commission for its Long Lines Department at Lawrenceville, New Jersey, to install a point-to-point radiotelephone station for communications with the telephone administration of the USSR at Moscow, Russia. At the present time, there is no radiotelephone service between the United States and the Soviet Union.

* * * *

FACED with a week's delay in restoration of full communications at the important Basic Magnesium plant if ordinary methods of transportation were used, Southern Nevada Telephone Company made history last month when it shipped a full-sized 4,300-pound telephone switchboard from Chicago to Las Vegas by special airplane.

When fire razed the administration building early last month it destroyed the entire central telephone system serving the far-flung plant. A temporary system was installed immediately after the fire, but this was not sufficient to care for the plant system, so a United Air Lines plane was chartered and seats removed to make room for the equipment leaving Chicago at 9 P. M. on March 7th.

The plane arrived in Las Vegas at 10 A. M. Sunday. All preliminary work having been completed, the equipment was installed and operating 450 plant phones an hour later. This is believed to be the first time a complete telephone switchboard ever was flown across country.

* * * *

PRODUCTION of communication equipment for the military services is expected to exceed a rate of $125,000,000 a month by the end of the year, Howard Browning, regional information officer, Office for Emergency Management, announced in Philadelphia last month.

The program for this type of war material, including that delivered, on order and yet to be allocated, amounted to approximately $2,000,000,000, he said. About half is for detector equipment, 2 per cent for aircraft and navigation equipment, 20 per cent for tank sets, walkie-talkies, etc., and the remainder for telegraph, telephone, and miscellaneous equipment. About 120 models are included, ranging in cost from $7 to $85,000 a unit.

Price Ceilings, Stay 'Way from My Door!

CERTAIN price controls and ceilings
Really would not hurt my feelings.
I could stand, with right good will,
A ceiling on my grocery bill.
If Henderson can curb my wife
From shopping, I'm his friend for life.
A price peg on the things I wear
Or buy, when I go on a tear;
A halter on the bills I pay;
These are boons for which I pray.
I approve a lower pitch
Upon war profits of the rich.
I'd welcome like the rare spring flowers
Ceilings on my working hours.
But one idea, I find outrageous,
A ceiling on my own poor wages?
It's Communism—mutiny!
Congress CAN'T DO THIS TO ME!!

—ARNOLD HAINES.

Financial News and Comment

By OWEN ELY

Federal Taxes Now Almost Sole Determining Factor in Utility Earnings

THE earnings of many utility companies now seem to be geared closely to Federal tax policies "for the duration." Many utilities are hopeful of obtaining some rate increases, especially where this can be worked out with large industrial users, or where there are fuel and tax clauses in present contracts, etc. It is even probable that state commissions in many cases may give an attentive ear to pleas for rate increases; Chairman Maltbie of the New York commission is said to be receptive and stockholders at the recent Consolidated Edison meeting raised a clamor for action by the management.

It is also likely that many industrial loads will continue to increase as new defense plants swing into operation. One sizeable company in the interior expects to operate at 90 per cent of theoretical capacity, it is reported. Night shifts swell the total output without increasing the peak load. Transition of auto plants to a war production basis is being completed more rapidly than expected.

Another possible factor which might help to improve earnings would be a reduction in maintenance expenditures, which might result from difficulty in making repairs during full-time use of facilities, or due to the difficulty of obtaining materials because of priorities.

If taxes could be ignored, therefore, utility earnings would probably continue on the upgrade despite higher wages and material costs. This is indicated by the accompanying table adjusting the share earnings of some typical companies to exclude the 1941 increase in taxes, and showing the estimated 1942 earnings (based on 1941 actual) adjusted for the proposed additional tax burden. Consolidated Edison, for example, would have earned $2.38 without last year's tax jump; if a 55 per cent tax rate is enacted earnings on the same operating basis will drop to around 95 cents, it is estimated.

Last year many companies were able to recoup a good part of their tax losses, but this year the going will be harder. If the 55 per cent rate is enacted, only 45 per cent of any gains accruing from rate increases, or improved net earnings due to heavier loads and greater efficiency, would accrue to stockholders. And if in

	Share Earn.		*Tax Incr. Per*	*1941 Earn. Excl. Tax Increase*		*Estimated 1942 Share Earnings*	
	1941	*1940*	*Share*	*Amt.*	*Gain*	*55% Tax†*	*45% Tax*
*Consolidated Edison ...	$2.00	$2.23	$ .38	$2.38	$ .13	$ .95	$1.40
Detroit Edison	1.96	1.69	.42	2.38	.69	1.47	1.66
Commonwealth Edison ..	2.10	2.32	.66	2.76	.44	1.34	1.65
*American G. & E.	2.72	3.00	1.11	3.83	.83	1.44	1.93

* Consolidated system statement.

† Some of these estimates vary from those published in the previous FORTNIGHTLY (page 31) which were quoted from *The Wall Street Journal*.

addition the company pays an excess profits tax (possibly half of them already do, and others might if their earnings increase) only 11¼ per cent of any such benefits would dribble through to stockholders—the government "take" is 88¾ per cent. Conversely any increased costs will be largely absorbed by the government. In other words, it is difficult to see how, under the proposed new law, there can be any great variation in stockholders' earnings where an excess profits tax is paid, except through the medium of special tax credits in connection with refundings, losses on security sales, etc.

Security Holders Should Fight New Tax Threat against Utilities

UTILITY security holders appear aroused over the threat of increased tax levies and want executives to do something about it. But the executives' hands are largely tied; operating economies are of little aid, and if they journey to Washington to appeal to Congress, they may be charged with "ganging up" on Congress, as in 1935 when the Utility Holding Company bill aroused so much excitement. A more effective procedure would be for individual utility investors to write *personal* (not mimeographed) letters to their Congressmen citing the dependence of their families on the income received from these investments, and urging recognition of the fact that the utility industry is already one of the most heavily taxed of all industries, while the services it performs are highly essential, not only to our normal existence, but to the war effort as well.

American Telephone has taken pride in never cutting its dividend. This stock is held by over 630,000 individuals or other stockholders. The company paid its $9 rate throughout the depression years in the 1930's although only about two-thirds earned, since those conditions were considered temporary. Would the directors take the same attitude at the present time if (as feared) the proposed new taxes again reduce earnings to around the $6 level?

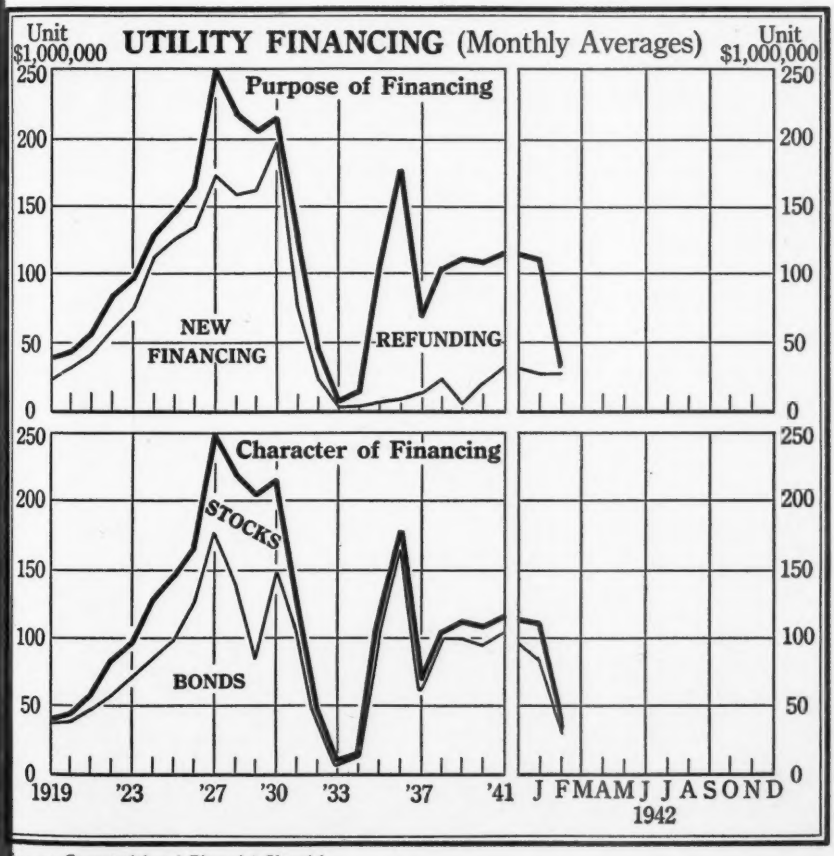
Consolidated Edison has nearly 30,000 preferred stockholders, over 100,000 common holders. They have seen share earnings drop from $4.07 in the worst depression year (1932) to $2 last year; in the same period taxes have increased from $2.90 a share to $5.49 a share. With a 55 per cent income tax it is estimated that the balance for stockholders would drop to 95 cents while taxes per share would rise to $6.54. Yet the SEC is constantly telling the utilities they should raise money by selling common stock instead of bonds. How will this be possible in the future unless the industry is given some relief?

IT is estimated that last year taxes averaged about 20.5 per cent of the electric utility revenue dollar — one-third more than labor received, more than stockholders received, twice as much as was spent for fuel to produce electricity. This is without the new taxes, which would "up" Federal income tax payments 78 per cent, excess profits taxes 25 per cent over last year. No one in the utility industry wants to shirk his war duties. But the industry is not enjoying swollen earnings from war contracts—on the contrary, earnings have been on a downward trend for years, despite a growth in output which any industry might well envy. Rates have been reduced year after year with clock-like regularity; and the recent adoption of fluorescent lighting is further greatly reducing the unit cost of illumination, though this is not reflected in the kilowatt rate figure. Isn't it time for the government to consider whether it is "killing the goose that lays the golden egg"? While the industry is still in healthy operating condition, sooner or later it may reflect the crippling effect of taxes and harsh regulation.

There has been a spontaneous demand from many quarters that Congress enact a sales tax instead of raising corporation tax rates so sharply. New Deal critics of the sales tax apparently feel that it will burden the low-income groups, since the tax might apply to many necessities. Thus

it is being shunned for the same reason that the income tax is not being extended to the low-income brackets. In the past it has been argued by Leon Henderson and others that, in proportion to income, the low-income groups bear more than their fair share of *total* taxes (including many indirect levies reflected in rentals, etc.). But wages and farm income have enjoyed such a big jump under war conditions that the situation has now changed radically. The extent of the change is reflected in the report on national income recently issued by the Department of Commerce. With this may be combined an estimate by the research division of Mr. Henderson's office, which indicates that the consumers' income will increase about $10,900,000,000 this year, of which about $9,700,000,000 will go to individuals and families having incomes of $2,500 or less. While the 1942 data are admittedly to some extent guesswork, we arrive at the percentages of national income taken respectively by labor and capital shown on page 502.

IN 1942 we estimate that labor should receive at least $74,500,000,000—a conservative figure since it includes no increase to those receiving more than $2,500 a year—compared with $53,000,-



Source: *Commercial and Financial Chronicle*

	1929	*1932*	*1941*	*1942 Est.*
Labor's share (wages, salaries, work relief, etc.)	64%	79%	70%	72%
Capital's share (rents, interest, dividends, undistributed earnings, farm net income, etc.)	36	21	30	28

000,000 in 1929, an increase of 40 per cent. Capital's income will, on the basis of these figures, be slightly lower than in 1929—about $29,000,000,000, compared with a little over $30,000,000,000 in 1929. This is despite the fact that capital needs increased income at a time like the present in order to protect itself against the anticipated post-war depression. (In 1932 capital's income was cut sharply to $8,300,000,000, while labor's income was $31,600,000,000.)

Based on the figures in the table, taking the annual income in each year as $100, labor now gets $72 compared with $64 in 1929, while capital has been cut down to $28 as compared with $36. Labor has gained 13 per cent, while capital was reduced 23 per cent. Yet capital is undoubtedly being taxed more heavily today than in 1929 and while figures are not easily obtainable, it seems probable that capital is paying a heavier proportion of the national tax bill than labor.

A sales tax could be equitably adjusted so as to avoid any undue burden on the necessities of life. One way to do this would be to exempt small purchases—say under 50 cents. The House Ways and Means Committee has received from the Treasury and staff of the joint congressional committee on taxation, various estimates on the possible yield of a sales tax. According to these figures a 10 per cent retail sales tax would yield $4,632,000,000 net to the government (exempting final sales to contractors for use in war production). If food, tobacco, liquor, drugs, etc., were exempted, the amount would be reduced to $1,-616,000,000. Such a tax would not bear heavily on the poor and could go far toward relieving the excessive features of the proposed new corporation taxes.

FPC Monthly Financial Reports May Prove Valuable

THE Federal Power Commission has asked about 250 major electric systems to supply monthly data (including comparative figures for the previous year) on revenues and income (on Form No. 213) on or before the twentieth of each month. Data requested included revenues and kilowatt hours, by classes of customers; expenses, depreciation, taxes, and miscellaneous deductions; income from rentals; interest, debt amortization items; and miscellaneous deductions. Information on fuel and labor costs is also requested.

Other reports which the utilities are now making to the FPC are being modified, and the commission is hopeful that "a net saving in effort devoted to preparation of reports" will be effected. The new information, if compiled by the commission on a monthly basis to show aggregate totals for the greater part of the industry, should be of immense interest to financial analysts and to utility executives. The data would to some extent correspond with the monthly figures of aggregate earnings for Class I railroads published by the ICC and by the Association of American Railroads. While the commission states that the information is requested for use in meeting problems connected with the war emergency, it would doubtless prove of great value to the SEC and to the utility industry as a permanent statistical record of the trend of gross and net earnings. It is hoped that, if the reports are compiled, the results will be released as quickly as possible each month. It is impossible to compile corresponding aggregate monthly figures from the statements now released

by the principal electric and gas systems, since most of these are on a three months' and twelve months' cumulative basis. Only a small number of important companies issue complete monthly figures.

"Prudent Investment"

THE text of the recent Supreme Court decision in the Natural Gas Pipeline Company Case is reported elsewhere in this issue (42 PUR(NS) 129); also, the reaction of some observers to the significance of the same (see page 505). But the immediate effect of the decision on the regulatory picture and the financial repercussions therefrom are still quite cloudy. State commissioners throughout the country were quick to perceive the possibilities of additional latitude given them by Chief Justice Stone's dicta in the majority opinion.

Yet the necessities of the war situation make it unlikely that the state commissioners will plunge right in for a series of wholesale rate base revaluations. The chairman of the Michigan Public Service Commission, Richard H. Barkell, for example, has warned the people of his state that the Natural Gas Pipeline decision does not of itself mean lower gas, electric, or telephone rates. This statement was made in view of the rising operating costs of utilities due to war conditions.

However, we can reasonably expect that the state commissions and the Federal commissions as well will lose no time in assembling or perfecting original cost data with respect to utilities subject to their jurisdiction. This would be by way of laying in a supply of regulatory ammunition for possible future use when utilities may be compelled to seek upward rate revision.

THE Federal Power Commission recently announced its determination that "reclassification and original cost studies are an essential aid to prosecution of the war effort in that they provide a sound basis for the most effective control of the prices of utility services entering into practically every important essential war activity as well as into the general cost of living. The availability of such regulation as a means of warding off the dangers of inflation in this field apparently led the Congress specifically to exempt the control of public utility prices from the provisions of the Emergency Price Control Act of 1942."

It is difficult to envisage any "danger of inflation" in utility rates, which have declined steadily for many years. The statement was contained in an order denying an application by Minnesota Power & Light Company asking the commission to rescind a show-cause order dated February 3, 1942, in which the utility was directed to show cause why it should not adjust its accounts in conformity with the recommendations of the commission's staff, why it should not dispose, or submit plans for the disposal, of amounts aggregating $31,506,414.78 in accordance with the requirements of the commission's uniform system of accounts, and why it should not submit a proper reclassification of amounts totaling $44,560,473.07. Of the $31,506,414.78 which the commission wished the company to dispose of, $9,450,628.16 was in account 100.5.

The SEC has, of course, been following the same general objectives as the FPC, although its efforts have been more indirect, through the medium of regulating new security offerings, integration of holding companies, etc. Its main effort has been to remove write-ups and increase depreciation charges, with perhaps less attention to amortization of excess purchase cost over original cost.

INTERIM EARNINGS PER SHARE

Electric and Gas Companies	*End of Periods*	*12-month Period* 1941	1940	Incr.	*3-month Period* 1941	1940	Incr.
American Gas & Elec. *Consol.*	Nov.	$2.71	$3.02	D10%	$ .71	$ .90	D21%
Amer. Power & Lt. (pfd.) *Consol.*	Nov.	5.44	6.71	D19	1.02	1.50	D32
American Water Works *Consol.*	Sept.	1.11	1.21	D9	..	..	..
Parent Co.	Sept.	.47	.41	15	..	..	..
Boston Edison	Sept.	2.43	2.39	2	..	..	..
Cities Service P. & L. (pfd.) *Consol.*	Sept. (a)	18.21	25.59	D29	..	..	..
Commonwealth Edison *Consol.*	Dec.	2.10	2.32	D10	..	..	..
Com. & Southern (pfd.) *Consol.*	Jan.*	8.04	8.58	D6	..	..	..
Consolidated Edison, N. Y. *Consol.*	Dec.	2.00	2.23	D10	.50	.57	D12
Parent Co.	Dec.	1.98	2.08	D5	..	..	..
Cons. Gas of Baltimore *Consol.*	Dec.	4.64	4.41	5	..	..	..
Detroit Edison *Consol.*	Feb.*	1.91	1.74	10	..	..	..
Elec. Bond & Share (pfd.) *Parent Co.*	Sept.	7.49	6.37	18	1.47	1.56	D6
Elec. Power & Lt. (1st pfd.) *Consol.*	Nov.	9.41	8.42	12	2.09	.84	150
Parent Co.	Sept.	1.94	1.77	10	.51	.41	24
Engineers Public Service *Consol.*	Dec.	1.27	1.61	D21	..	..	..
Federal Light & Traction *Consol.*	Sept.	1.74	2.24	D22	.41	.31	32
Long Island Lighting (pfd.) *Consol.*	Dec.	3.10	2.96	4	..	..	..
Parent Co.	Dec.	3.92	3.93	..	..	..	..
Middle West Corp. *Consol.*	Sept. (a)	.85	.88	D3	.40	.39	3
Parent Co.	Sept. (a)	.36	.35	3	.08	.15	D47
National Power & Light *Consol.*	Nov.	1.06	1.39	D24	..	..	..
Parent Co.	Nov.	.33	.65	D49	..	..	..
Nor. States Pwr. (Del.) *Consol.* (Cl. A)	Dec.	2.54	2.69	D6	..	..	..
Pacific Gas & Electric *Consol.*	Sept.	2.20	2.79	D21	..	..	..
Public Service Corp. of N. J. *Consol.*	Feb.*	1.88	2.47	D24	.81	.96	D16
Southern California Edison	Dec.	2.35	2.24	5	..	..	..
Stand. Gas & Elec. (pr. pfd.) *Consol.*	Dec.	6.22	8.76	D29	..	..	..
Parent Co.	Dec.	2.29	2.02	14	..	..	..
United Gas Improvement *Consol.*	Sept.	.88	1.03	D14	.13	.24	D46
Parent Co.	Dec.	.72	.97	D26	..	..	..
United Lt. & Power (pfd.) *Consol.*	Sept.	9.37	7.89	19	..	..	..
Parent Co.	Sept.	4.58	4.50	2	..	..	..
Gas Companies							
American Light & Traction *Consol.*	Nov.	1.85	1.84	1	..	..	..
Brooklyn Union Gas	Dec.	2.08	2.42	D14	..	..	..
Columbia Gas & Electric *Consol.*	Dec.	.33	.52	D37	.07	.12	D42
El Paso Natural Gas *Consol.*	Dec.	3.40	3.76	D10	..	..	..
Lone Star Gas *Consol.*	Dec.	1.06	1.17	D9	..	..	..
Oklahoma Natural Gas	Dec.	3.47	4.02	D14	..	..	..
Pacific Lighting *Consol.*	Dec.	3.35	3.13	7	..	..	..
Peoples Gas Light & Coke *Consol.*	Dec.	6.53	4.63	42	1.94	1.23	58
United Gas Corp. (1st pfd.) *Consol.*	Dec.	14.34	12.27	16	4.50	2.55	76
Parent Co.	Sept.	8.30	9.21	D10	1.00	.95	5
Telephone and Telegraph Companies							
American Tel. & Tel. *Consol.*	Dec.	10.26	11.26	D9	..	..	..
Parent Co.	Dec.	10.01	10.08	D1	..	..	..
General Telephone *Consol.*	Dec.	2.86	2.65	8	..	..	..
Western Union Tel.	Dec. (b)	7.05	3.46	104	..	..	..
Systems outside United States							
Amer. & For. Pwr. (1st pfd.) *Consol.*	Sept.	6.59	5.53	19	1.83	1.81	1
Parent Co.	Sept.	4.14	3.10	33	1.05	.61	72

*1942-41 figures.
D—Deficit or decrease.
(a) Nine months' period.
(b) In January, 1942, 34 cents was earned *v.* 14 cents last year.

What Others Think

Has the Supreme Court Torpedoed Smyth *v.* Ames?

THE recent decision of the U. S. Supreme Court in Natural Gas Pipeline Company *v.* Federal Power Commission (reported in full text in the *Public Utilities Reports* section of this magazine—42 PUR(NS) 129) has produced some conflicting reaction. The New York *Journal of Commerce* on March 17th stated editorially that the court had paved the way for the general adoption of the prudent investment basis for the valuation of public utility property by regulatory agencies. The editorial continued in part as follows:

> The essential purpose of utility regulation is to attract additional capital to an industry, so that the public may be served adequately. There is no reason why a fair return, year in and year out, upon the actual investment in utility property shall not suffice to attract new capital, provided the rate of return allowed is reasonable and the basis of valuation adopted is equitable. The Supreme Court's decision yesterday held that a 6½ per cent return is an acceptable rate. The ultimate effects of yesterday's decision will not be determinable, however, until the factors entering into valuations also have been more precisely defined.
>
> What elements are to be deducted from actual investment on the ground that they are not "prudent"? Will the court insist that adequate sums be allowed as deductions from earnings for depreciation and depletion, in determining whether any given level of rates provides an excessive return upon the investment? Will a company be permitted to deduct all legitimate expenses, in determining its rate of return upon the investment?
>
> Until these questions have been answered, the full practical significance of yesterday's Supreme Court decision upon utility rates cannot be measured accurately. In passing upon these and other questions closely related to approval of the prudent investment basis for utility valuation, it is to be hoped that the courts will, at all times, recognize that the underlying economic objective of regulation must be to provide capital invested in public utility property with an adequate return so as to attract additional funds as required for new facilities with which to serve the public. Unless this is done, the basis for private operation of the public utilities in this country will, in time, be seriously undermined, opening the way for the substitution for our system of individual enterprise of state socialism.

A point to remember in this connection, however, is eventual inflation—perhaps extreme inflation. Win, draw, or lose, it is conceded that the American dollar is going to be a war casualty to some extent in the *post bellum* era. This happened after World War I in the form of a substantial commodity price inflation during the early twenties. If the value of the currency unit should shrink as much as 80 per cent (which was the French experience) or nearly 100 per cent (which was the German experience in 1924), it would be not only unfair but ridiculous to hold utilities to a rate base expressed in depreciated dollars on the basis of original cost, however prudently or imprudently invested.

THE *Wall Street Journal* in its issue of March 18th takes a somewhat different view of the significance of the natural gas pipe-line decision. It stated editorially:

> Before our "liberals" jump to the conclusion that the Supreme Court in its decision on Monday of the Natural Gas [Pipeline] Company of America and the Texoma Natural Gas Company cases has scrapped the Smyth *v.* Ames rule of 1898 they will do well to take another look at the majority opinion, and also that of the minority.
>
> What was the Smyth *v.* Ames rule? It was simply that property devoted to the public service was entitled to earn a fair return on the "value" of that property from the rates charged for the service. Both the "fair return" and the "value" were facts to be ascertained, and as such might vary at times and places. The rule did not specify any fixed rate of return. Nor did it lay down

a rule for ascertainment of "value" beyond enumerating certain factors which might enter into its determination. Among these were "original cost" and "reproduction cost" and certain others of minor importance and relevance.

In construing this rule over the intervening years the Supreme Court has followed a single course without any deviation. In summary it has said that original cost is not necessarily "value," that reproduction cost is not necessarily "value," but that "value" must be *present* value; that is, value at the time of inquiry as to rates. And it has approved at various times various rates of "return" as "fair."

The *Journal* went on to explain the prudent investment cost theory as propounded by Justice Brandeis in his special concurring opinion in the Southwestern Bell Telephone Company Case. The court rejected that theory in a series of rate case decisions. But it always found favor with left-wing analysts of utility economics. The Supreme Court intervened to strike down rate orders of administrative bodies only in cases where these orders had obviously not been founded upon judgment of the facts, which took into account all factors relevant to the determination of fair value.

The *Journal* pointed out the famous O'Fallon Case as an instance in which the ICC had proposed a rule of its own and in so many words had admitted that it did not "obey the law of the land." But in the Natural Gas Pipeline Case the FPC did not propose any rule of its own. It did not lay down any new principle. The *Journal's* editorial concluded:

> If proof were needed that the "law of the land" is unchanged by the decision, it is found in the joint minority opinion of Justices Black, Murphy, and Douglas. These Justices upbraid the majority for not "laying the ghost of Smyth *v.* Ames," the "ghost" being the rule of fair return on the "value" of the property. They assert that the court has no power under the Constitution to set aside a rate order, and that the Federal Power Commission may adopt "prudent investment" as a rate base if it sees fit. From this it is clear that the majority of the court did not so decide. If it had, the minority would not have made its complaint.
>
> The nub of the matter is simply this: The Smyth *v.* Ames rule of fair return on "value" of property devoted to the public service where there are no contract stipulations as to rates between the parties is simply equity.
>
> The "prudent investment" rule may properly (and conveniently) be established by agreement (as it virtually is in Massachusetts) but may not be imposed so long as the "law of the land" remains as it has been for over forty years. There is nothing in these latest decisions to show that it has changed in any important particular.
>
> Is it perhaps overcynical to remark that some day, after a long decline in prices, our "liberals" will probably be again clamoring —as they did in the early nineteen hundreds —for reproduction cost as the norm of value for rate-making purposes as they now clamor for "prudent investment"? It has happened once—why not again? It seems as if the only rule that will permanently satisfy them is the rule of "whichever is lowest" proposed some years ago by a "progressive" Senator.

A MORE middle-of-the-road type of analysis is ventured in the March 17th bulletin of the National Association of Railroad and Utilities Commissioners, which is sent to members of that group by its Washington representative and general solicitor, Judge John E. Benton. This bulletin stated in part:

> The most important discussion in the opinion is that relating to the so-called Smyth v. Ames rule, claimed by the company to require the use of reproduction cost. The commission had "accepted" the evidence of reproduction cost as offered by witnesses for the company, who expressly testified that it excluded any allowance for the going concern element. The commission used the company's estimate of reproduction cost as a rate base for the purpose of an interim rate reduction order, excluding the going value claim. The claim of the company was that the rate base used, being identical with the estimate of reproduction cost, necessarily excluded the going concern element. There was, however, evidence of the original cost of the property, substantially less than the rate base used.
>
> The Federal Power Commission, in its brief, asked the court to discard the so-called Smyth *v.* Ames rule, and to sustain the order, on the basis of the original cost evidence in the record. In the *amicus curiae* brief, filed by this association, . . . the contention was made that the Pacific Gas and Electric opinion had established the rule that a commission may be governed by original cost evidence to the exclusion of reproduction cost evidence when it finds the former more satisfactory than the latter as proof of a proper rate base. The court was urged to make it clear in its opinion that a regulatory commission may exercise discretion a

"I ALLUS TOLD YOUR FATHER BEFORE YOU THEM AUTYMOBILES WOULDN'T LAST"

to whether it will or will not receive evidence as to reproduction cost.

Upon this point the opinion of the Chief Justice says in part: "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas.

"Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made, and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the commission's order, as applied to the facts before it and viewed in its entirety, produced no arbitrary result, our inquiry is at an end."

The Black-Douglas-Murphy opinion says: "While the opinion of the court erases much which has been written in rate cases . . . we think this is an appropriate occasion to lay the ghost of Smyth *v.* Ames, 169 US 466. . . . As we read the opinion of the court, the commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of 'fair value.' The commission may now adopt, if it chooses, prudent investment as a rate base . . ." This comment of the minority, as to the meaning of what the majority said, ought to be highly significant. The majority did not choose to use the clear language used by Justices Black, Douglas, and Murphy. Nevertheless, those Justices concurred in the judgment, and ought to know what the accompanying opinion was designed to mean. Their understanding led them to say in their opinion that "this case starts a new chapter in the regulation of utility rates."

A somewhat forthright analysis of the court's decision also appeared in the

March 20th issue of *PUR Executive Information Service,* a Washington weekly letter dealing with utility affairs. This stated as follows:

The Supreme Court's decision this week upholding an FPC order reducing gas rates of the Natural Gas Pipeline Company is destined to be a landmark decision in utility regulation. Because the significance of the decision has been poorly appraised in the press, here is a restatement of points to bear in mind:

1. The majority opinion (Chief Justice Stone) did *not* overrule Smyth *v.* Ames. The FPC had tentatively accepted the company's valuation figures, hence reproduction cost *v.* prudent investment was not an issue. This tentative rate base was actually computed on reproduction cost.

2. Realistic appreciation of the majority opinion, however, requires that Stone's dicta be viewed as an indication of the temper of the court majority on the valuation issue. Stone makes it clear that the majority is not going to interfere with Federal (or state) commission rate base fixing in future cases —cases in which valuation will be a real issue.

3. In other words, regulatory commissions can now write their own ticket on valuation methods without fear of court restraint—but the court majority does not (and probably will not) endorse prudent investment or any other single formula. "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas." The concurring minority (Black, Douglas, Murphy) indicate a disposition to go "all out" for prudent investment.

4. The majority's mild reservation of a judicial right to interfere with rate fixing which has clearly overstepped "the limits of due process" affords little protection for utility property from adroit regulatory persecution *at present*—the prevailing court being what it is and prevailing circumstances what they are. This reservation may, however, become exceedingly important in the future. It can become the foundation for the establishment of a new body of protective case law under a different court and circumstances. This would be more difficult if the Stone opinion had closed the judicial door entirely on relief from oppressive regulatory action—a course favored by the minority.

5. Other items of the decision included: Constitutional blessing for the Natural Gas Act of 1938—the same for FPC powers to fix "interim rates." A 6½ per cent return was OK'd; separate allowance need not be made in the rate base for "going concern value."

A general estimate of this case is that it is another "Pontius Pilate decision." Like the TVA Case (in which the court avoided passing on the merits of a constitutional issue by simply denying the right to sue), the court majority is seeking to wash its hands of regulatory controversies. In line with other recent decisions, the court is obviously retreating from the assertion of any position of independence from legislative and administrative action. If the Supreme Court in the past went too far in interfering with the other two branches, it is clear that it is now bound in the direction of a perfunctory, supervisory tribunal. In time this process may be stopped, but there is no present prospect.

THE *Indianapolis* (Indiana) *News,* after reviewing the gist of the Natural Gas decision, makes this practical contribution: "Regardless of what the court said, the tendency of fair-minded members of regulatory bodies will be to judge each case on its merits." We may reasonably assume that some state commissions which have long cherished a predilection for original cost and prudent investment now feel free to put their theories into regulatory execution. We shall probably also witness a revival of rate-fixing experiments and short cuts, such as the cost index and spot price valuation methods.

But in the final analysis the Federal and state commissions will realize their responsibility to keep the wheels of the utility industry going for the maintenance of vital public service during this critical emergency period. This sense of responsibility is likely to temper any temptation which might otherwise be experienced to indulge in an overnight orgy of drastic rate base upheavals simply because the Supreme Court has apparently all but resigned its self-assumed function as the supreme keeper of the regulatory conscience of the United States.

—F. X. W.

A London Gas Company System for Dealing with Bomb Damage

READERS of the FORTNIGHTLY may recall previous contributions to these pages by Michael Milne-Watson, well-known London gas utility official. More recently Mr. Milne-Watson has been active in the affairs of the London Regional Gas Center. On the 30th of December, 1941, Mr. Milne-Watson wrote to Davis M. DeBard, vice president of Stone & Webster Service Corporation, and enclosed a schedule showing the procedure which takes place after the fall of a bomb in a gas utility district in London.

Mr. Milne-Watson emphasized that during the night no temporary or permanent repairs are made to London gas mains owing to (a) the blackout, (b) the intensity of the bombing. In other words, nightly repairs are in the nature of "first aid" repairs in order to stop the escape of gas and to put out fire. With the coming of the dawn, however, repair work really gets under way. For this, some form of organization is necessary to see that as many men as possible come in before daylight in order to start work.

Another point stressed by Mr. Milne-Watson in his letter was as follows:

> Too much emphasis cannot be laid upon the importance of providing mobile water pumps. These should be standing by with special teams of men ready to start pumping at the earliest possible moment as the flooding of the distribution system from broken water mains is one of the most serious effects of bombing. Much can be done beforehand by the installation of suck pipes at low points in the distribution system.

THE "order of operations," summed up in a chart for a London gas company having an area of 280 square miles with 5 operating divisions, is as follows:

1. *The bomb falls.* Local neighborhood warden sums up the damage and reports to his post warden. The post warden informs the local authority control. (The gas utilities are dependent on the national civil defense organization for information from local authorities that damage has occurred to gas mains and supply pipes.)

2. *The local authority control telephones the various utility services.* This information contains no technical details since the air-raid warden is not a technical man and his primary duty is the saving of life and prevention of fire. At this point the message amounts to no more than a request that the gas utility send a repair party. In cases of trapped casualties or fire, a request for priority attention may be included.

3. *The gas company report officer for the area affected takes down the message.* He hands it to the "plotting officer" who plots the position on a map of the mains which shows the size of the main at the spot. The report is taken down on a 4-part form made up with interleaved carbons. This form becomes the job ticket for the repair party and one copy is filed as the permanent record of the job. (Each bomb is plotted on the mains' map with a special red pin having a cork insert in the head into which can be stuck other pins to indicate progress of the work.)

4. *The gas company divisional operations officer sums up probable damage.* The division operations officer is guided in his decision by the nature of the report which is received from the authorities. But where trunk mains are involved he gets confirmatory evidence from the fall in gas pressure. He assigns priority to jobs involving casualty or fire, otherwise parties are first dispatched to streets where there are large mains. Light parties are sent except where there is reason to believe damage has been done to a main.

5. THE *divisional operations officer instructs the leader of the light repair party.* He tells the leader what damage is suspected. He gives further details if the operation of valves in the mains is necessary. The leader of the party is

given full particulars of possible damage. (The speedy arrival of the light party, even when the job turns out to be more than they can handle, has been found to be very important in preserving morale.)

6. *The light party goes to the scene of the incident in a car.* There are tools, clay, plugs, and valve keys in the car. If the party has been so instructed it closes the valves and inspects the damage. If the incident is a minor one they deal with it. The leader of the party always informs the local authority's "incident office" as soon as the party arrives and keeps them informed of progress.

7. *The leader of the light party reports back to the operations officer.* He uses the warden's post telephone or he may go in person, giving details of the work done and a technical report of the damage. These reports contain all relevant details, such as which mains are damaged, broken, or cracked, whether there is débris in the crater or flooding, etc.

8. *If it is a large job, a heavy repair party is dispatched.* These heavy parties travel in lorries converted into mobile work shops. They work from substations throughout the area. The operations officer instructs the nearest substation by phone to send a party. (When all repair parties in any division are in use, an appeal for assistance from neighboring divisions can be made to the company's headquarters' control.)

9. *The heavy repair party works at the incident until damage is temporarily secured.* This party takes with it a compressor and road breakers. The party remains on the job until all affected mains are cut off. If additional plant or resources are required, these can be obtained by reference to the division control. Large parties are held by the division control for mains above 12 inches in diameter.

10. *After "all clear" signal, operations officer plans program for permanent repairs.* These permanent repairs are done by daylight. Arrangements have to be made to pump water from flooded mains which usually requires a comprehensive pumping scheme. Each division must keep headquarters' control advised of local situation so that permanent repair program can be determined by the requirements of the company as a whole.

THE guiding rule in the foregoing step-by-step procedure is that "gas must be restored to all areas as soon as possible." It is not enough to restore supply to a factory if the factory workers are unable to get hot meals at home. The company's headquarters' control reports the position of all "incidents" to regional gas center. The latter central agency informs local authorities if a temporary interruption of supply demands the organization of community feeding.

The key to the success of the whole organization system, says Mr. Milne-Watson, is "well-trained repair parties, reliable transport, and adequate communications."

A Banker's Eye View of Municipal Bonds

EVERY day of the emergency brings us more signs that the era of "cheap money" is passing, if not past. This is true even of the bonded obligations of the so-called "blue chip" variety.

Among the bonded obligations that will be watched carefully during this period of rapid and unpredictable economic transition are the municipal bonds. Municipal bonds, if we make allowances for their taxing power and tax-exempt features, have been generally good, bad, and indifferent in about the same proportion as average good corporate bonds.

But there has been more than a fair suspicion that, since the depression-born period of forced expansion and Federal subsidy, some municipal bond credit has been traveling more on momentum than renewed earning power. In the field of public utility service, for example, public ownership advocates have frequently

"HONORABLE SECRET YANK WEAPON, NO DOUBT"

pointed to the advantages of "cheap money" obtainable through municipal bonds, revenue or otherwise, apparently with the assumption that such cheap money will always be obtainable.

And yet we know, as a matter of simple mathematics, that if municipalities continue to assume more and more commercial, if not actually speculative, risks, their credit will eventually be so diluted that the municipal risk could not (or should not) be any better than the corresponding risk taken by a private corporation.

THE reputation which municipal securities have built up in the past—largely on the assumption that municipal governments would remain within the confines of normal government activities, supported by the normal tax-raising powers—is capable of providing a momentum which can carry such securities along in a market for some time after the assured earning power which lies beneath them has become quite debatable. Of course, it may take the exposition of a few unfortunate cases for a realistic appreciation to be generally aroused.

It is for this reason, namely, the need for more realistic appreciation of factors which control municipal obligations and the credit beneath them, that a recent volume sponsored by the Federal Deposit Insurance Corporation makes a most welcome appearance. It is entitled "Municipals" and ostensibly is the product of the Committee on Municipal Obli-

gations of the National Association of Supervisors of State Banks.

As Leo T. Crowley, chairman of the FDIC, states in a foreword of this volume, there is already available credit information for most types of earning assets held by banks. As a basis for local loans, lend officers may be guided by financial statements and credit records. Published figures and statistical services give us a pretty accurate picture of most private corporate securities. "But," says Mr. Crowley, "adequate credit information concerning obligations of states and their political subdivisions has always been difficult to obtain."

This lack of satisfactory credit data becomes a more serious problem in view of the increasing volume of such obligations in the hands of banks. Commercial banks insured by the FDIC by the end of 1940 held over $3,600,000,000 — an amount greater than the investment of such banks in all corporate securities.

To fill in this blank, the Committee on Municipal Obligations, under the chairmanship of Edward A. Wayne of South Carolina (incidentally, the editor of the volume), undertook to assemble the necessary information and present it in a simple, understandable, and attractive form. The resulting inexpensive volume "Municipals" is a job well done indeed.

THE scope of the book falls into two divisions. Part I on municipal credit reports is largely given over to the "uniform credit file" developed by the committee for assembling clearly and concisely the type of information needed in appraising investment soundness of municipal obligations. There are instructions for preparing the "uniform credit file," and illustrations of its use in the case of three political subdivisions: Orangeburg, South Carolina, Greenwood county, South Carolina, and Pasadena, California.

Part II deals with municipal credit analysis. It contains fundamental considerations used in evaluating general credit obligations of political subdivisions. In a chapter entitled "Conclusions," the volume says in part:

> The satisfactory servicing of municipal debt depends upon the existence of an adequate margin between the revenue which the jurisdiction can collect and the costs of providing the governmental services regarded as necessary. Inasmuch as local governments typically issue long-term bonds, an analysis of the credit of a particular jurisdiction involves forecasting both its responsibilities and taxing resources over a long period. The rapid changes of this century make such forecasting difficult. The analyst must not only be on the alert to detect shifts in industry and trade which will affect the area in question, but he must evaluate the effect of political changes as well. More and more services are demanded of government, but there is no agreement upon either the relative responsibilities, or the taxing resources of the three levels of government. Since there is no direct relation between the responsibilities which governments assume and the sources of revenue upon which they can draw, any particular unit may be hard hit by being forced to assume expensive functions without acquiring additional revenues. Likewise, the loss of important sources of revenue may prove embarrassing if some of its costs are not assumed by another level of government.

IN other words, the ability of a local government to raise money depends upon the income of the people of the area, the efficiency of the revenue system, and the amount of taxes levied upon the same taxpayers by other jurisdictions. As governments assume more functions, the character of municipal management becomes more important. "The fact that new responsibilities are sometimes forced upon local governments before they have had opportunity to perfect an organization to handle them efficiently adds greatly to the problems of management."

Gossip, news items, investigation, and court cases, while often revealing, provide no steady or reliable substitute for factual reports for gauging the caliber of local government and the risk of securities issued by it. The publication of "Municipals" is a helpful step in the direction of formulating widespread, uniform policies with respect to the assembling of such factual information.

—F. X. W.

MUNICIPALS. First Edition. Price $1. Federal Deposit Insurance Corporation, Washington, D. C. 108 pages.

The March of Events

Preference Rating Revised

THE War Production Board on March 26th issued a complete revision of Preference Rating Order P-46 which was issued last September to assist utilities in obtaining the minimum amount of materials necessary for maintenance, repair, and operation. That order assigned a blanket preference rating of A-10 to such materials.

The recent order superseded the original order and all amendments thereto and made several important changes, the principal of which are:

1. The blanket rating of A-10 in the original order is replaced by two higher ratings. An A-2 rating is granted to deliveries of material for maintenance, repair, and operating supplies for power plants and pumping plants. An A-5 rating is granted for all other facilities, such as lines, pipes, and substations. One of the reasons for the distinction is that if a power plant or a pumping station breaks down, the whole system is put out of business. If a power line or a water pipe breaks, only a part of the system is affected. In either case, the rating is high enough to make possible prompt repair.

2. The order also assigns a rating of A-5 to deliveries of materials to bring electricity, gas, or water to war plants or other projects bearing a rating of A-5 or better. This does not apply to housing projects. An A-5 rating is also granted to deliveries of materials needed to protect power or water plants against sabotage such as fencing, tear gas bombs for guards around such plants, etc. These ratings may not be applied without prior authorization from the director of industry operations of the War Production Board.

3. Line extensions to serve a new consumer are restricted to 250 feet. The original order permitted a 1,000-foot extension. Extensions begun prior to March 26th, the date of issuance of this order, may be completed.

Despite this restriction, the WPB Power Branch announced that houses that were wired prior to March 26th or for which the foundations were completed by that date, may be served with electricity provided they are not more than 2,000 feet from an existing line and provided the utility specifies that galvanized steel wire will be used instead of copper. This policy, which has been concurred in by the steel branch, will also permit extension of service to a number of homes which were already wired when the 1,000-foot extension limit was imposed last December 5th.

The power branch made it clear, however, that authorization must be obtained for each extension over 250 feet.

Heads Rural Electric Group

THE National Rural Electric Coöperative Association was organized on March 20th, its incorporators announced, to aid rural electric coöperatives' help in the war effort and to assist in general with the problems of such coöperatives.

The association, the announcement said, would be composed of rural electric coöperatives now functioning over the country.

Steve C. Tate, of Tate, Georgia, was named president. Among other incorporators and directors of the association are Will Hall Sullivan, of Lafayette, Tennessee, and Thomas B. Fitzhugh, of Little Rock, Arkansas.

President Seizes Railroad

PRESIDENT Roosevelt on March 21st commandeered the 239-mile Toledo, Peoria & Western Railroad after the company president, George P. McNear, Jr., rejected for the sixth time urgent Federal appeals that he arbitrate a wage dispute which resulted in a strike of 104 engineers and trainmen on December 28th. The strike, in effect until the President acted, had been marked by disorders and violence.

Using his plant seizure powers in a labor dispute for the first time since the United States went to war, and for the fourth time since the national defense program began, the President directed Joseph B. Eastman, director of the Office of Defense Transportation, to take over and operate the road "by or for the United States in order to assure successful prosecution of the war."

Entire blame for the necessity of seizing the railroad was placed upon the management, as the President pointed out in his executive order that the two unions involved in the strike —the Brotherhood of Locomotive Enginemen and Firemen and the Brotherhood of Railway Trainmen—had agreed to arbitration proposals made by the United States Conciliation Service, the National (Railway) Mediation Board, the Office of Defense Transportation, and the National War Labor Board.

Mr. McNear told the President that the company rejected arbitration in the belief that

it "would be definitely contrary to the best interests of our country."

West Coast Pooling System

OFFICIALS of the War Production Board's power branch were recently reported to be working out a power pooling system for the Pacific coast to assure a maximum power supply for expanding war industries in that area.

V. M. Marquis of the power branch was said to be on the West coast working with officials of the Department of Interior and state power authorities in California in arranging a power pool system similar to those which have been worked out for the New England area, the southeastern area, and the Arkansas-Texas-Louisiana area.

The need for the pooling of power facilities on the West coast resulted from the location of the new magnesium plant in that area, officials said. The pooling system may not be put into operation immediately, according to officials in Washington, but it was held almost certain to follow new power demands for war industries as new plants are completed.

Bill Asks Survey by Ickes

LEGISLATION authorizing Secretary of Interior Harold L. Ickes to survey possible new sources of strategic materials and to construct power facilities for their development was introduced on March 17th by Senator Joseph C. O'Mahoney, Democrat of Wyoming, "To win the war and save small business."

The bill specificially would authorize Ickes to:

1. Spend $2,500,000 for surveys and studies of possible new mineral sources.
2. Construct and operate electric generating facilities to make cheap power available for development of such minerals.
3. Construct and operate pilot plants for perfection of methods of treating ores.
4. Certify qualified applicants for Federal loans to develop additional mineral sources when the War Production Board finds a specific shortage.

Eastman Asks Delay

THE Office of Defense Transportation last month requested that increases authorized by the Interstate Commerce Commission in the freight rates for sulphur, lumber, and cement be postponed pending a request for adjustment in these rates on certain routes, Joseph B. Eastman, director, said in a formal statement.

The ODT also has requested the carriers to refrain from increasing the transcontinental west-bound rates on iron and steel articles and to waive increases recently authorized by the ICC on iron and steel scrap, the statement said.

Mr. Eastman made no reference to the request of the Office of Price Administration for postponement of advanced rates on ten important groups of commodities. However, the items which the Office of Defense Transportation specified in its statement were among those on which the OPA opposed rate advances. His statement, Mr. Eastman said, was designed "to prevent misunderstanding as to the position of the ODT with respect to transportation rate adjustments."

EEI Convention Called Off

THE Edison Electric Institute's annual convention, scheduled for the first week of June at Atlantic City, New Jersey, will not be held this year, C. W. Kellogg, president, announced recently.

He said the decision was because of heavy war demands on electric utility companies.

New TVA Battle Opened

A BATTLE between Senator McKellar, Democrat of Tennessee, and directors of the Tennessee Valley Authority over the financial procedure of the public power agency opened on March 16th before a congressional committee.

Charging the TVA organization with incurring "inexcusable, wasteful, and extravagant expenses" in connection with the travel of its officials, the senior Tennessee Senator called for support of his bill to require payment of TVA's power revenues into the Treasury monthly, subject to expenditure only by congressional appropriation.

McKellar was the only witness before a Senate agricultural subcommittee headed by Senator Bankhead, Democrat of Alabama. David E. Lilienthal, chairman of the TVA, was instructed to return the following day.

McKellar asserted TVA officials spent $875,959 travel and allowance money in trips involving public carriers last year, plus $1,320,000 in other travel involving the use of the authority's 763 passenger cars and other equipment.

McKellar charged Lilienthal and H. A. Morgan, another director, had opposed construction of every TVA dam since Wheeler and Norris dams, and that former Chairman A. E. Morgan actually lobbied against the dams which were approved largely through his own efforts.

McKellar also filed for the record reports on expenditures by the TVA in inserting page advertisements in newspapers throughout Tennessee and the remainder of the TVA area and expressed the view the directors felt they were "too big, too powerful, too strong" to be subject to congressional control.

Lilienthal told newsmen that if the McKellar bill became law "the war efforts of the TVA, essential to the aluminum and aircraft programs of this country, would be impeded, the TVA's business efficiency would be destroyed at one stroke, and the development of the Ten-

nessee valley region set back a quarter of a century."

ICC Authorizes Truck Merger

DESPITE objections by the antitrust division of the Department of Justice and the Secretary of Agriculture, the Interstate Commerce Commission on March 20th granted the application of Associated Transport, Inc., of New York to merge eight Atlantic seaboard trucking companies into what will be the largest single motor carrier in the United States.

Clyde B. Aitchison, acting chairman, and Commissioners Walter M. Splawn and William J. Patterson dissented from the findings of the majority of the commission. These were that the consolidation would improve transportation service, promote safe operation, and result in substantial operation economies; that assumption by Associated Transport of the fixed charges of the eight carriers would not be inconsistent with the public interest; that there are substantial duplications in the operations of these carriers but that the proposed consolidation would rectify this situation; that acquisition of control through stock ownership and complete consummation of the consolidation within a year would be consistent with the public interest; that if the proposed transaction is completed, there would remain ample competitive motor carrier service throughout the territory involved; that Associated Transport is not and upon consummation of the transactions as proposed would not be affiliated with any railroad; that Associated Transport's capitalization would not be excessive.

The antitrust division of the Department of Justice had contended that interchange of equipment by the eight carriers without consolidation and physical transfer of lading would provide the benefits of through trailer service.

The commission commented that while this was theoretically true in practice, carriers were reluctant to turn over their equipment to one another.

As no immediate rate reductions are proposed, the antitrust division had argued that accomplishment of economies by the consolidation would not benefit the public.

Arkansas

Municipal Power Pool Proposed

FORMATION of a power pool among all municipally owned power plants in Arkansas as a means of conserving electricity and providing facilities for emergency use was proposed by Mayor Neely of Little Rock last month.

A meeting of managers of all city-owned or leased power plant managers was called by Mayor Neely and Victor Beals, North Little Rock electrical engineer, when plans for the proposed pool would be discussed.

Under Mayor Neely's plan, cities of the state would be linked by a statewide network of power transmission lines. In case of unusual demand for power or of power failure in any locality, surplus electricity from other sources could be "piped" into the area where it was needed. Feeder lines could be established by each city at small cost, and existing intercity lines utilized, Mayor Neely said. Plans for financing the pool remained to be worked out.

The mayor suggested that municipal plants operated on a leased power line could transfer excess electricity during hours of light demand. It was also suggested that large power users could be asked to shut down during the peak period.

Representatives from the following towns were invited: West Memphis, Osceola, Paragould, Jonesboro, Bentonville, Siloam Springs, Clarksville, Paris, Conway, Benton, Hope, Forrest City, Prescott, and Augusta. Officials of the Arkansas Power & Light Company and the REA also were invited.

California

Hetchy Controversy Settled

SAN Francisco's troublesome Hetch Hetchy power problem was settled last month for the duration of the war. The city's electricity is going to work to produce the supplies which will provide the sinews of war for the men who shoulder guns, man ships, and fly planes.

Specifically, the power which the Supreme Court said the city could no longer sell to the Pacific Gas and Electric Company will be used to turn the wheels of an aluminum plant to be constructed immediately with Federal funds and probably located at Modesto or near-by Riverbank in Stanislaus county.

Final approval of such a project was obtained in Washington on March 13th from the several Federal agencies concerned by the city's 3-man special committee which went East for the purpose several weeks ago. Utilities Manager E. G. Cahill, Assistant Attorney Dion Holm, and Utilities Department Engineer Louis Perrin constituted the committee.

Not only will existing hydroelectric output

be utilized by the new defense plan, but it was disclosed that the long-planned but never developed supplemental generating plant at Red Mountain Bar is to be built and its production used also.

It was indicated that PG&E may be called upon to supply part of the envisioned load, forecasting construction of major proportions.

Cahill's telegram to Mayor Rossi, which was jubilantly received at city hall, read in part as follows:

"Department of Interior Power Division and Federal Power Commission and power branch of War Production Board approved Hetch Hetchy power for use by a war industry. National Resources Board and Army and Navy Munitions Board recommended to aluminum and magnesium branch of War Production Board that an aluminum plant be established somewhere in Central California valley along Hetchy power transmission lines. Aluminum branch recommended it to plant sites board. Plant sites board recommended it to War Production Board."

Transportation Problem Studied

THE Los Angeles Chamber of Commerce and the state railroad commission last month launched a joint comprehensive public transportation survey of more than 500,000 employees in Los Angeles' 150 plants of 500 or more workers.

Investigating the individual facts concerning each employee and his transportation, the survey will tabulate the whole mass and come up with the foundation for a revision of the city's transportation structure.

Survey cards have been printed for each of the employees to learn where they live, how they travel, condition of private autos and tires, and how long such conveyances will operate. This information will be compiled by trained statisticians and tabulated on maps as the basis for a solution of the problem, it was said.

Joseph B. Eastman, director of the Federal Office of Defense Transportation, indicated that he felt this to be the finest survey of municipal transportation he had ever seen. Accordingly, he recommended it to the governors of each of the 48 states.

Chartering of busses for sight-seeing or pleasure trips was suspended on March 12th by many bus lines. Immediately affected was the Pacific Greyhound Lines' fleet of busses running Sundays only between San Diego and the Agua Caliente racetrack. Regular service of all bus lines throughout California and eastward would continue as usual.

Santa Fe Trailways, Pacific Greyhound, and Pacific Electric busses will refuse to charter special coaches, however, for social or athletic events, outings, picnics, conventions, school athletic teams, student followers of athletic squads, hiking or snow trips, and any other trips which could be classified as "nonessential transportation."

Governmental conservation of rubber prompted the new restrictions.

Colorado

FPC Orders Rate Cut

"PRUDENT investment" was used by the Federal Power Commission on March 25th in ordering a cut of more than $2,000,000 in wholesale natural gas rates in Colorado, New Mexico, and Wyoming—the so-called Denver rate case. The rate base as determined by the commission was some $6,000,000 below the original cost claimed by the companies—Canadian River Gas Company and Colorado Interstate Gas Company. A 6½ per cent rate of return was allowed.

Natural gas rates in the Chicago area are affected, since a reduction of $655,000 was ordered in the charges made by Colorado Interstate to the Natural Gas Pipeline Company of America.

The commission indicated a belief that increased revenues are sufficient to offset admittedly higher taxes, wages, and material costs. Such belief was implied in denying the petitions to reopen the proceedings (closed more than a year ago) for the receipt of evidence on the upward trend of costs.

Recoverable reserves of the Canadian company (which carries gas from the Texas Panhandle and Hugoton field) will last more than fifty years, the FPC asserted. A life of thirty-eight years (from December 31, 1939) was assigned to the company's main pipe line.

The Colorado Interstate Gas Company, which transports gas from Texas to Denver and other cities in that region, said in its petition that much of the evidence given a year ago was obsolete because of war conditions and should not be used for a final determination of the issues. The petition said in evidence produced at the hearing it was estimated that the company would pay $683,784 in Federal taxes applicable to net earnings in 1941, but it now develops the amount will be $1,233,779. Estimates of the taxes the company will have to pay for the entire period from the time of the hearing until its contract for the sale of gas to the Public Service Company of Colorado terminates in 1948 should now be revised in view of the recent tax increases, the company contended.

The Wyoming Public Service Commission asked the FPC on March 19th to deny petitions to reopen the natural gas rate case.

Indiana

Supreme Court Upholds Deal

THE United States Supreme Court last month refused to take up the protest of the Public Service Company of Indiana against an Indiana Supreme Court decision upholding the purchase by the city of Lebanon of the firm's utility property in and around the town.

The state high court overruled the company's constitutional objections to the purchase by condemnation and sustained a jury's verdict that damages to the company would be $210,000.

In its appeal to the highest court, the utility reiterated its constitutional arguments contending that Indiana statutes authorizing condemnation proceedings were intended to apply only to real estate, "not to a going business concern."

It is also argued that it is operating under an "indeterminate permit" and that an attempt to condemn the utility without paying for the permit would impair a contract in violation of the Fourteenth Amendment.

Gas Transfer Voided

JUDGE John W. Baumunk in Clay Circuit Court at Brazil on March 12th ruled for the plaintiffs, Mrs. Lenora Johnson and Charles J. Kolsen, of Terre Haute, against the Indiana Gas Utilities Company, the Terre Haute Gas Corporation, and the state public service commission in holding the order of the commission for the transfer of $1,250,000 worth of property invalid.

The suit was brought by two Terre Haute gas patrons objecting to transfer of the property of the old Indiana Gas Utilities Company, serving Terre Haute, Brazil, Clinton, and West Terre Haute to the new Terre Haute Gas Corporation. The case was venued to Clay Circuit Court from Vigo county. By Judge Baumunk's ruling the property goes back to Indiana Gas Utilities.

The suit contended the order of the state commission for the sale of the property was void in that two commission members were not present when it was written after hearings December 5th and 6th, 1940.

Sale of the properties was effected last April under terms of an order issued by Judge Vincent L. Liebell, of the United States court of the southern district of New York, permitting the Associated Gas & Electric Corporation to sell the physical properties of its subsidiary, the Indiana Gas Utilities Company, to the Terre Haute Gas Corporation.

Kansas

Natural Gas Curb Set

THE War Production Board recently ordered curtailment of the consumption of natural gas and mixed natural and manufactured gas in 26 Kansas counties to conserve critical materials used in gas-burning equipment.

The three eastern tiers of counties of Kansas were affected. Previously WPB had designated all or part of 17 states and the District of Columbia as areas where installation of gas heating systems or conversion of heating equipment from other fuels to gas was forbidden.

The order bans the installation of gas heating systems in homes, stores, or factories. Utility companies delivering natural gas, or natural gas mixed with artificial gas, were forbidden to supply gas for heating unless the heating equipment was installed before March 20th or the equipment was specified in the construction contracts of buildings whose main foundations were completed prior to March 20th.

Kentucky

Decide on TVA Tie-in

MAYOR Pro-Tem Gaston W. Cole on March 18th said city officials of Bowling Green had definitely decided to seek a local tie-in with the TVA rather than attempt to purchase local properties of the Kentucky-Tennessee Light & Power Company and operate them under city supervision.

The announcement was made following the return of Cole and other city officials from a trip to Clarksville, Tennessee, where they studied that city's TVA power set-up.

Under the TVA plan, Bowling Green would purchase the local distribution and the TVA would purchase the Kentucky-Tennessee generating plant in Bowling Green and sell to the city electricity produced in the plant.

Municipal purchases of Kentucky-Tennessee properties without TVA connections were recommended by Louisville investment men last month at a meeting of representatives from eight cities in the area. At that time the investment men said that should Bowling

Green fail to accept their plan, their proposal of municipal ownership throughout that area would be killed, since Kentucky-Tennessee's central generating plant for the area is located in Bowling Green.

The Bowling Green city attorney told the local council that rates to utility users in the city possibly would be cut in half under a TVA set-up. A 10 per cent rate reduction was suggested by investment firm representatives under municipal ownership.

Utilities' Machinery Exempt

MANUFACTURING machinery of Louisville's public utilities is exempt from local taxation, just as such personal property is exempt in the rest of the state, the court of appeals ruled on March 17th at Frankfort.

T. B. Wilson, president of the Louisville Gas & Electric Company, which challenged the city's claim that it as well as the state could tax the property, estimated an adverse decision would have cost the utility approximately $2,140,000 in taxes and penalties over a 6-year period—1935 through 1940.

In an opinion by Commissioner Osso W. Stanley, the high tribunal considered only the 1935-38 period and set the total claim against the company at $1,300,000 for that period. Had the city won its claim, Mr. Wilson said, it was probable an additional claim would have been placed for the years 1939-40.

Commissioner Stanley said other Louisville utilities, such as steam railroads and the city street railway system, also were affected by the ruling, but Louisville officials would not estimate the loss in taxes from them under the decision.

The court said the city's claim against the gas and electric company in 1940 was the first it had made in twenty-three years and attributed the subsequent controversy to "confusion and indifferent references" by state legislatures to previous laws and constitutional amendments.

Louisiana

Rate Ordinances Adopted

THE New Orleans commission council on March 12th adopted three ordinances putting into effect reduced gas rates suggested by Judge Rufus E. Foster and approved the appointment of a director of the newly created miscellaneous revenues division.

The director of the new division is A. Frank Fairley, whose appointment was embodied in a resolution introduced by Acting Mayor Fred A. Earhart. Mr. Fairley has been head of the sales tax division since its creation.

The reduced gas rates became effective March 22nd, the law requiring that ten days elapse from the date of adoption of the ordinances. The measures make the new rates retroactive to September 15, 1941, so that New Orleans Public Service Inc. would be obligated to make rebates on the 6-month bills rendered since that date. Officials have estimated that the total refund for approximately 100,000 consumers would exceed $400,000.

The gas rates, as proposed last December by Judge Foster, who was named arbitrator in the gas rate situation, follow:

For domestic consumers: 90 cents for the first 700 cubic feet; 70 cents per thousand for the next 5,300 cubic feet; 60 cents per thousand for the next 14,000 cubic feet; and 50 cents per thousand for all gas used above 20,000 cubic feet.

For small commercial consumers: 90 cents for the first 700 cubic feet; 70 cents per thousand for the next 49,300 cubic feet; 60 cents per thousand for the second 50,000 cubic feet; and 55 cents per thousand for all gas used above 100,000 cubic feet.

In both instances the 25-cent monthly service charge was eliminated.

Michigan

State Orders Data

ALL public utility companies in Michigan will be asked to submit data on the original cost of their plants, Richard H. Barkell, state public service commission chairman, announced on March 19th.

"This is in line with the recent United States Supreme Court decision that rate bases should be fixed on original rather than reproduction costs," he said.

"We have not yet received a copy of the decision, which will be studied carefully before we proceed farther. But we want the data on original cost in order to be prepared for the possibility of new rate cases."

Barkell said the data which the companies submit will be "augmented through some investigation of our own."

Detroit city officials believe the opinion ultimately may affect the utility bills of all city householders. They were particularly interested in Michigan Consolidated Gas Company rates, it was said.

Minnesota

FPC Refuses to Rescind Order

THE Federal Power Commission asserted reclassification and cost studies were essential to the war effort and a barrier to inflation in the utility field, in denying the application of the Minnesota Power & Light Company to rescind a show-cause order issued by the commission. Commission had ordered the company to show cause why it should adjust accounts in conformity with recommendations of the commission's staff, why it should not dispose of amounts aggregating $31,506,414 in accordance with requirements of the commission's uniform system of accounts, and why it should not submit to reclassification of amounts totaling $44,560,473.

Studies provide, the commission said, a "sound basis for the most effective control of the prices of utilities services entering into practically every important essential war activity as well as into the general cost of living."

The company was given until April 6th to enter its reply.

Mississippi

Bill Would Lower Rates

REPRESENTATIVE Howard McDonnell of Biloxi last month introduced a bill into the state legislature which would lower all public utility rates. The bill attacked all public utilities by placing all electric, gas, telephone, and telegraph operations under the jurisdiction and control of the Mississippi Public Service Commission.

If enacted into law it would eliminate the high prevailing rates, as the state commission would adjust all rates, basing such rates upon the investment and actual costs of production, thereby eliminating the great profits now enjoyed by the utilities, McDonnell pointed out. He said it would further eliminate the penalties "which the consumer now pays under the guise of a gross charge when each monthly bill is not paid on time."

A bill permitting municipal officers to fix power and gas rates was passed in the state senate on March 17th. Offered by Senator Evon Ford of Taylorsville, the measure has been advocated for a number of years by Senator James C. Rice of Natchez.

"Mississippi has long needed such a statute," Rice said. "I hope the house will approve it. This bill gives our local authorities regulatory powers that should be vested in them."

Under the bill interested parties could appeal to state rather than Federal courts.

Missouri

Court Upholds Power Bonds

THE city of Kennett knocked over another legal obstacle in more than eight years of litigation over its efforts to issue $140,000 in bonds for construction of a municipal electric light and power plant, when the state supreme court on March 13th upheld the legality of procedure by which the city council sold the bonds in March, 1941.

The court affirmed a judgment of Dunklin County Circuit Court, which dismissed a suit by the Arkansas-Missouri Power Corporation to enjoin city officials from carrying out a contract and agreement covering sale of the bonds to a Kansas City brokerage firm.

Power of the city to build the plant, resisted by the Arkansas-Missouri Corporation in Federal and state courts in various suits since the bond issue was voted in August, 1933, has been upheld by the courts. The latest suit was designed to block the sale of the bonds.

New York

Gas Ban Upheld

CITING the necessity of conserving gas for war industries, the state public service commission on March 17th upheld the Republican Light, Heat & Power Company's refusal to supply gas for heating of homes under construction in its Tonawanda district. The commission ruled, however, the supply to homes already being served must be continued.

The industrial demand for gas has increased nearly four times in recent years and is 125 per cent above that of January, 1938, company representatives testified at a hearing, which makes it impossible to meet heating gas orders for new homes. They added the company can

obtain no additional source of gas supply.

Rate Rise Linked to Tax Bill

CONSUMERS of electricity and gas throughout greater New York will be faced with the prospect of higher rates if new tax proposals on corporations recently proposed by Secretary of the Treasury Morgenthau are enacted in law, Floyd L. Carlisle, chairman of the board of Consolidated Edison Company of New York, declared on March 16th.

Ohio

Company Hits Rate Demand

THE state public utilities commission had under advisement last month the objections of counsel for seven subsidiaries of the Columbia Gas & Electric Corporation, including the Ohio Fuel Gas, to the commission order of February 16th, requiring the submission of all contracts, agreements, and franchises with communities served.

The objections to the commission's move were based primarily upon the contention that the rate reviewing body lacked jurisdiction in the matter of the distribution of mixed gas, and that the companies are unable to explain or defend any alleged irregular practices unless the commission's order is made more specific.

Aside from the Ohio Fuel Gas Company, other distributing companies named in the original order were the Cincinnati Gas & Electric Company, the Dayton Power & Light Company, the United Fuel Gas Company, the Northwestern Ohio Natural Gas Company, the Manufacturers Light & Heat Company, and the Natural Gas Company of West Virginia.

The commission's order of last February had rescinded an earlier order in which these same companies were required to show cause why they should not cease the further distribution of mixed gas to communities unless their individual contracts called for such gas.

Pennsylvania

Rate Investigation Ordered

THE Pittsburgh city council last month ordered the law department to bring a direct complaint to the Federal Power Commission against the wholesale rates of three natural gas companies who sell to Pittsburgh distributing companies.

The resolution was adopted unanimously after Councilman Thomas J. Gallagher declared that the Hope Natural Gas Company, of West Virginia, charges the Peoples Natural Gas Company of Pittsburgh "higher rates than the latter collects under its state tariff from its large users, resulting in an unfair burden on local home users."

Gallagher asserted that the FPC, under the Natural Gas Act of 1938, can, upon the direct complaint of any municipality, regulate the rates charged for transporting and selling natural gas in interstate commerce for ultimate distribution to the public. The cities of Cleveland, Akron, Toledo, Columbus, and Cincinnati, Ohio, have already brought complaints against unlawful rates charged, he added.

Other companies named in the Gallagher resolution were the United Fuel Gas Company and the Pittsburgh and West Virginia Gas Company, both West Virginia firms.

Meet on Seaway Project

GOVERNOR James recently announced that, in view of the unanimous adoption by the state senate on March 18th of the Mallery resolution calling upon him to summon a nonpartisan conference on the St. Lawrence waterway and electric power project, he would confer with Richard Maize, secretary of mines.

The secretary, who approves the purposes of the resolution, has said that construction of the project would be a severe blow to the state's coal industry because of the generation of electric power from water instead of coal.

The governor said the "political and economic phases of the question have been discussed for many years. As governor of this state we are going to try to find out what the facts are, although I do not know exactly how we are going to do this."

After pointing out that carrying out of the waterways project would affect not only Pennsylvania, but New York, Ohio, and in some respects Indiana, he said all eastern ports would feel its effect.

Power Strike Postponed

THE Congress of Industrial Organizations' Utility Workers Organizing Committee last month called off a threatened strike against the Pennsylvania Edison Company, a power source for ten counties, at the request of the War Labor Board. The union had previously appealed to President Roosevelt for Army operation of the company if the dispute was not settled. Secretary of Labor Perkins certified the dispute to WLB. The strike had been scheduled to protest reclassification of thirty-one workers.

South Carolina

No Special Session

THE possibility of a special legislative session being called by Governor Jefferies was discarded last month after the chief executive on March 16th signed a $575,000 deficiency appropriations bill whose legality of ratification he had previously questioned.

The measure was among 78 or more acts ratified March 14th in the closing minutes of the state general assembly's 38-day session. Governor Jefferies, terming as "discourteous" the legislature's adjournment before he had had time to consider the money bill and deliver a final message, had threatened to withhold his signature from the bill, making it inoperative until next January, or until he called a special legislative session.

The governor, although apparently chagrined at the lack of legislative action on a bill to permit the Santee-Cooper project to purchase $42,000,000 of private power utilities, said that "had no connection whatever" with his displeasure at the abrupt *sine die* adjournment.

He said further that the state could and "should now acquire these [the South Carolina Electric & Gas Company and Lexington Water Power Company] utility properties." He cited the 1934 act creating the Santee-Cooper (South Carolina Public Service Authority) as not prohibiting purchase of these utilities.

Governor Jefferies, who until he became governor was general counsel for the Santee-Cooper, said the bill whose passage he had hoped for would have saved the state "hundreds of thousands of dollars in interest" on financing the proposed purchase, and would have protected state, county, and local taxes on the properties. The present law exempts the power authority from state and local taxes.

Simultaneously with the governor's suggestion that the purchase proceed, an injunction to restrain acquisition of the properties was sought by an independent consulting engineer.

Tennessee

Pipe-line Petition Extended

THE state utilities commission on March 13th gave the Tennessee Gas & Transmission Company another sixty days in which to show its financial ability and priority on delivery of materials for a proposed natural gas pipe line into Tennessee.

The company has sought a certificate to permit its construction and operation of a pipe line from Louisiana through Tennessee into North Carolina, entering the state near Lawrenceburg and leaving near Sevierville. Laterals would lead to Nashville, Chattanooga, Knoxville, and other points.

Extension of the deadline for filing proof of financial ability was granted upon the company's request.

Utah

Cheap Power Needed

IF Utah gets its proposed hydroelectric and steam-power plants, it will be "made" as one of the nation's important industrial centers, Governor Herbert B. Maw said recently.

Speaking at a meeting of the Salt Lake County Democratic Central Committee in Salt Lake City, the governor commented that, although $400,000,000 worth of new industries will give employment to 35,000 persons in Utah this year, the state's industrial expansion has been limited by the absence of cheap power. Secretary of the Interior Harold L. Ickes' recommendations for construction of steam and hydroelectric power plants in Utah will remedy the situation, the governor added.

Industrial development for Utah, the governor asserted, began with the $30,000,000 Salt Lake small arms ammunition plant.

Wisconsin

Rural Meter Reading Interval Widened

IN an effort to reduce tire consumption by state utilities, the state public service commission on March 20th ruled that meters in certain rural areas need be read only once in three months instead of once a month as formerly. Written authorization from the commission for this change will be necessary, the commission said.

The Latest Utility Rulings

Extension of Maturity Date of Securities Exempted under Holding Company Act

THE Laclede Gas Light Company, a utility company, subsidiary of Ogden Corporation, a registered holding company, was granted exemption pursuant to § 6(b) of the Holding Company Act for an offer of extension, and an extension, of debt securities maturing prior to the time at which reorganization could reasonably be expected to be consummated. A plan for reorganization, pursuant to § 11(e) of the Holding Company Act, is presently pending before the commission. A showing was made as to the exercise of reasonable diligence in the prosecution of the proceeding for reorganization, and conditions were imposed prohibiting dividends and otherwise designed for the protection of bondholders during such extended period.

Ogden Corporation was permitted to acquire debt securities of the subsidiary not extended by public holders thereof in acceptance of the offer of extension, since such acquisition was for the purpose of facilitating an extension of debt maturity made necessary in order to accomplish a reorganization of the subsidiary company, and the parent company would pay the principal amount of securities so acquired in full, together with accrued interest thereon to public holders, and would agree to the proposed extension in respect to the securities so to be acquired. The commission said:

> While the immediate effect of the acquisition of these securities by Ogden will be an increase by it of its investment in Gas Company and, therefore, seemingly, a step in the opposite direction from that goal of divestment of control of Gas Company and other public utility subsidiaries of Ogden envisioned at the time of the organization of Ogden, yet, in fact, the purpose of such present investment is the facilitation of such a reorganization of Gas Company as will make possible the disposition by Ogden of its entire investment therein, as well as, at the same time, the placing of Gas Company in a financial condition more conducive to the economical and efficient development of the public utility system operated by the latter company. For these reasons, and in view of the factual situation here presented, we find no occasion for adverse findings under § 10(b) or § 10(c)(1), and find that, as required by § 10(c)(2) the acquisition of such securities by Ogden will serve the public interest by tending toward the economical and efficient development of an integrated public utility system.

A further problem was presented by the request by the parent corporation that, after acquisition by it of bonds not otherwise extended and the extension of such bonds, it be permitted to sell, from time to time, the bonds so acquired by it at not less than 99 per cent of principal amount plus accrued interest, or at such lesser price as the commission may, from time to time, approve. Such sale, the commission pointed out, might result in a loss to Ogden. It did not appear that this loss was such as to constitute an unreasonable cost to Ogden for the indirect benefit to be received, in common with other stockholders of the subsidiary gas company, from the consummation of the proposed transaction. Nevertheless, said the commission:

> . . . we do not feel that we should at this time permit the declaration of Ogden to become effective upon the basis suggested, since market conditions and other factors over the period during which it is contemplated that these bonds will be sold may vary greatly from time to time and the limits of reasonableness of the price at which such bonds may appropriately be sold may vary accordingly. We will, therefore, reserve jurisdiction with respect to the resale of such bonds, requiring that at the time of each proposed sale Ogden submit evi-

dence as to the reasonableness of the price to be obtained.

In the same connection it was indicated that in the event Ogden should be able to resell the bonds to be acquired by it at a premium, the profit realized from such sale would be considered by it to be received in its own right rather than for the benefit of the subsidiary gas company.

The commission was by no means convinced of the correctness of this position, in view of the fiduciary relationship occupied by Ogden, and the commission made it clear that it was not presently concurring in the position of the holding company upon this point, but it expressly reserved the same for consideration at the time approval might be sought for specific sales of bonds. *Re Laclede Gas Light Co. et al. (File No. 70-469, Release No. 3376).*

Right of City to Appeal from Rate Order Affecting Residents

A CITY has a right to appeal from an order of the Illinois Commerce Commission in a rate proceeding even though rates for service to the municipality itself are not in question, according to a decision of the supreme court of Illinois. Apart from the issue of representation in rate proceedings, the court held that the city, having been recognized by the commission and the company as having sufficient interest to be made a party to the proceeding, was in consequence "affected" by the order awarding an increase of rates.

This question arose in a case in which a water company petitioned the commission for authority to increase rates. Higher rates were authorized for residents of the city, but rates for service to the municipality itself remained the same. Illinois statutes authorize cities to appear as complainants in certain matters before the commission and to initiate investigations relating to rates or other charges or services of public utilities within such cities. They also prescribe that notice be given to a city and provide that when an application for an increase in rates is filed the city shall not only be entitled to appear but shall be entitled to present evidence relating to the subject matter of the inquiry, investigation, or hearing. This had been done.

These provisions, said the court, demonstrated that the city was a party before the commission not only because it was itself a consumer of water, but for the additional reason that it was the representative of the resident consumers within its territorial limits. Moreover, the interests of the city in the proceeding did not terminate upon the entry of an order adverse to the city's residents but favorable to the city itself, particularly where the resident consumers were not parties before the commission. The court added:

> Indeed, if appellant was not the representative of its residents then no one, so far as domestic and commercial rates are involved, was before the commission and the order of January 28, 1941, as to such rates, was an *ex parte* order entered without notice and, hence, void.

The decision in Public Utilities Commission ex rel. Dixon Water Co. *v.* Dixon (1920) 292 Ill 521, 127 NE 143, had been urged by the company in support of its position, but in that case there was involved the question whether a consumer could be compelled to discontinue the use of a meter giving satisfactory service and accept for his meter a price fixed by the commission, which was said to be a question in which the city was in no way concerned. No one could raise that question except some consumer whose rights were in some way affected. Nevertheless, it was observed that the appeal of the city in the Dixon Case was not dismissed, although the contentions made were decided adversely to the city.

The attention of the court was directed

to decisions from other jurisdictions where commissions corresponding to the Illinois commission represent the people, and where the city is not deemed affected by an order adverse to its residents.

In Illinois, however, it was said that the commission is an administrative board, quasi judicial only in its nature. The Illinois Supreme Court continued:

> It is true, of course, that pursuant to statute it may institute proceedings on its own motion and may make independent investigations. Its decisions, however, must be judicial and, if so, the commission cannot be said to represent one party as against another.

Inter-State Water Co. v. City of Danville, 39 NE (2d) 356.

Priorities and Service Extensions

In a case before the Pennsylvania commission where water main extensions had been ordered, the company, on an application for rehearing, alleged that owing to the national emergency it would be difficult to secure priorities under the national defense law, and, further, that it would be difficult to secure materials and an assurance of delivery even after they are secured. The commission, however, said:

> The petitioner does not allege that it has applied for and has been refused a priority rating by the Supply Priorities and Allocations Board. In our opinion the allegations contained in those paragraphs are too speculative to merit consideration at this time: St. Joseph Stock Yards Co. *v.* United States (1936) 298 US 38, 80 L ed 1033, 14 PUR (NS) 397, 56 S Ct 720.

As to an allegation that the company was not earning a fair return on present value, the commission said that the burden of proving that construction of extensions would amount to confiscation was upon the company and the record was void of sufficient evidence for a finding of fair value. It therefore followed that since no finding of fair value could be made, no finding could be made of return on fair value. *Pennsylvania Public Utility Commission v. Westmoreland Water Co. (Complaint Docket No. 12601).*

Depreciation Explained in Rate Decision by Pennsylvania Commission

An order of the Pennsylvania commission requiring reductions in gas rates and awarding reparation for excess charges is accompanied by an opinion covering, among other matters, the question of depreciation, both annual and accrued. As stated by the commission, an attempt was made to determine "how far the property under the influence of wear and obsolescence has moved along the road from the condition of newness to the condition of junk."

The two contending schools of thought, one advocating the observational method and the other the age-life method, were considered. Use of the observed condition as the sole measure of accrued depreciation, said the commission, discredits what, when rightly used, is a very desirable procedure. The commission continued:

> To determine accrued depreciation by a mathematical formula, without the modifying influence which an actual examination of the property provides, is to disregard the realities and is therefore ridiculous. But equally ridiculous is the idea that any observer, no matter how well trained, can, by looking at a property, determine the precise percentage to which it has depreciated. The two processes are at opposite extremes, and both are beyond the bounds of common sense. . . .

It is a commonly recognized fact that any property, be it a building, an automobile, or a meter, will appear to depreciate at a progressively more rapid rate. If a meter were observed at the end of its first, second, and third years of life, it might appear to have depreciated 1 per cent, 3 per cent, and 6 per cent, respectively, from its original newness, or, put in another way, the first year might appear to contribute 1 per cent depreciation, the second year 2 per cent, and the third year 3 per cent.

The commission criticized a method taking into account the realized depreciation which the first two years of life contributed but not the potential depreciation which they have accumulated and which they will pass on as an inheritance to be realized in the third year of life. The third year of life, said the commission, will show a realized depreciation of 3 per cent—a loss greater than either of the two preceding years—not because the meter will be used harder but because the third year begins with a meter which is only 97 per cent condition—a condition which is ascribable only to use during the two preceding years. It follows that those two years should be held accountable for the loss they have occasioned. Similarly, all of the first three years will pass on to the fourth year a property which is more susceptible to depreciation than ever before. This potential depreciation must be taken into account during each year of the meter's life.

The rate base was determined by a consideration of reproduction cost, original cost, accrued depreciation, book cost and invested capital, depreciation reserve and expensed property, going concern value, working capital, and, finally, fair value. No separate allowance was made for going value. Return allowance was fixed at 6½ per cent. *Pennsylvania Public Utility Commission v. Peoples Natural Gas Co. (Complaint Docket Nos. 11380, 12683, Sub. No. 20).*

Court Refuses to Pass on Regulation Dealing with Future Policy

THE Federal District Court for the southern district of New York dismissed for lack of jurisdiction complaints brought by the National Broadcasting Company and the Columbia Broadcasting System to enjoin and set aside regulations of the Federal Communications Commission dealing with chain broadcasting systems and declaring conditions upon which the commission would in the future issue licenses to radio stations affiliated with network organizations.

Government attorneys moved for dismissal on the ground that the regulations were not "orders" within the meaning of the statutes relating to judicial review; that they were not orders of any sort but merely announcements of the course which the commission will pursue in the future.

The networks, however, replied that the regulations had an immediate effect and that they presently adjudicated the invalidity of contracts between themselves and their affiliates.

The court did not consider it necessary to commit itself generally as to what "orders" are reviewable. It was said that, so far as the court had found, the Supreme Court has never declared that the act of October 22, 1913 (38 St L 219), which § 402(a) of Title 47, US Code, incorporated by reference as the measure of the court's jurisdiction, authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends.

This, it was said, does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful. It might be that the plaintiff could bring actions in equity, but, even so, they would not be the actions at bar, which could be brought

only under the statute, since otherwise the United States could not be sued nor could the commission be sued in the New York district.

Orders granting or refusing licenses are reviewable only in the court of appeals of the District of Columbia. If the instant actions were to lie, the plaintiffs, it was said, would have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. *National Broadcasting Co. et al. v. United States et al.*

Other Important Rulings

THE Colorado commission ruled that the mere fact that the commission does not have jurisdiction over a rural electric association does not constitute a reason for its disapproval of a contract by an electric company to sell a portion of its property to the association, the question of jurisdiction being one of law. *Re Western Colorado Power Co. (Application No. 5640, Decision No. 18147).*

The United States Supreme Court held that an application under the "grandfather" clause of the Motor Carrier Act was properly denied where, from the effective date of the act to the date of application, most, if not all, of the traffic handled by applicant was solicited and billed by other motor carriers and moved in the applicant's vehicles only between the terminals of those other carriers. *Lubetich v. United States.*

The supreme court of Oklahoma, in denying a writ in an original action in prohibition against the corporation commission to stay proceedings for contempt, ruled that the provisions of the state Constitution, providing that for violations not in the presence or hearing of the court, or judge sitting as such, of any order of injunction, or restraint, made or entered by any court or judge of the state, an accused should be entitled to a trial by jury and the provisions of the statute relating to contempt, are not applicable to a proceeding before the commission to punish for contempt of its order, for the reason that the corporation commission is not a court, the commissioners thereof are not judges, and contempt of an order of the commission is undefined and, being so, is governed by the common law as construed and modified only by limitations of Constitution and statutes specifically applicable to such contempt. *Vogel v. Corporation Commission, 121 P(2d) 586.*

The supreme court of New Jersey, in dismissing certiorari proceedings against the board of public utility commissioners and the Pennsylvania-Reading Seashore Lines, held that the board has power to discontinue passenger service little used when other means of transportation are available; that the public has no vested right to ride in trains for short distances, when busses operate in the same region and the train service is unduly costly and patronized by few people; that a railroad company is not obliged to waste materials and money on a service which serves no useful purpose. *O'Connor v. Board of Public Utility Commissioners, 24 A(2d) 411.*

The Pennsylvania commission held that a nonprofit trade association conducting delivery service for such members as might request and agree to pay for the service was not a bona fide cooperative association within the purview of the Public Utility Law, but was conducting public carriage subject to the jurisdiction of the commission. *Pennsylvania Public Utility Commission v. Philadelphia Association of Wholesale Opticians (Complaint Docket No. 13611).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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Points of Special Interest

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TITLES

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UNITED STATES SUPREME COURT

Federal Power Commission et al.

v.

Natural Gas Pipeline Company of America et al.

[No. 265.]

Natural Gas Pipeline Company of America et al.

v.

Federal Power Commission et al.

[No. 268.]

(— US —, 86 L ed —, — S Ct —.)

Interstate commerce, § 23 — Regulation by Congress — Natural gas transportation.

1. The sale of natural gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce, which is subject to regulation by Congress, and it is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a state, p. 135.

Rates, § 11 — Powers of Congress.

2. The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the states under the Fourteenth Amendment to regulate the prices of commodities in intrastate commerce, p. 135.

Rates, § 11 — Powers of Congress — Wholesale natural gas.

3. Congress has power to regulate the price of natural gas moving in interstate commerce and sold at wholesale, p. 135.

Rates, § 649 — Hearing — Examination of witnesses.

4. So far as an interim rate reduction order is supported by the evidence natural gas companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission; the right to a full hearing does not include the right to challenge or rely on evidence not offered or considered, p. 136.

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Appeal and review, § 28.4 — Conclusiveness of rate order — Decision by Federal Power Commission.

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Rates, § 3 — Constitutional requirements — Regulatory authority.

9. The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas, but agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances, p. 137.

Appeal and review, § 15 — Scope of review — Commission rate order.

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Valuation, § 332 — Going concern value — Separate allowance — Constitutional requirements.

11. There is no constitutional requirement that going concern value, even when it is an appropriate element to be included in a rate base, must be separately stated and appraised as such, but when a business is valued for rate purposes as a whole without separate appraisal of the going concern element, the burden rests on the regulated company to show that this item has neither been adequately covered in the rate base nor recouped from prior earnings of the business, p. 138.

Valuation, § 342 — Going value — Capitalizing early cost — Excess plant capacity.

12. The fact that companies not regulated from the start may have been entitled to earn a fair return upon the total value of their plant, including equipment in excess of immediate needs when beginning business, does not mean that the companies' property would be confiscated by denying to them

the privilege of capitalizing the maintenance cost of excess plant capacity, which would allow them to earn a return and amortization allowance upon such cost during the entire life of the business, p. 138.

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Depreciation, § 31 — Amortization period — Recently regulated business.

17. Adequate provision is made for restoration of a company's investment from earnings and a fair return on the investment when the annual amortization allowance, if applied over the entire life of the business, rather than the period since regulation began, is sufficient to restore total capital investment at the end, even though the company was unregulated during several years at the beginning of its business, if earnings during that period were available and adequate for amortization, p. 142.

Depreciation, § 32 — Amortization interest rate — Sinking-fund reserve.

18. Companies are not deprived of property because of the fact that a Commission allows for annual amortization an amount which, if accumulated at a 6½ per cent compound interest rate (the same as the rate allowed for return) until the assumed termination of the enterprise, instead of making an allowance based on a lower interest rate on the assumption that only some lower rate would be earned by a hypothetical sinking fund, where the amortization method does not contemplate a sinking fund of segregated securities purchased with cash withdrawn from the business but merely a sinking-fund reserve charged to earnings and not distributable as ordinary dividends, no deduction of the amortization allowances being made from the rate base, p. 143.

Appeal and review, § 28.4 — Conclusiveness of findings — Rate of return.

19. The courts are required to accept findings of the Federal Power Commission as to the fair rate of return if they are supported by substantial evidence, p. 144.

Return, § 101 — Natural gas company.

20. An allowance by the Commission of a return of 6½ per cent upon the rate base of a wholesale natural gas company was held to be supported by substantial evidence where the business was exceptionally free from hazards, substantially all of the gas was to be distributed in a metropolitan area (a stable and growing market) through affiliated companies under a long-term contract, and affiliation with large corporations owning stock placed the company in a strong position for future financing, p. 144.

Appeal and review, § 16 — Scope of review — Matters considered — Disposition of excess charges.

21. The question of the disposition of excess charges collected since a Commission's rate reduction order, which order was stayed upon the giving of a bond for refund pending appeal, is not before the Supreme Court for determination when it does not appear from the record on a review of a lower court judgment vacating the order that there is any basis for not compelling the companies to surrender exactions held by the Supreme Court to be illegal, p. 145.

Appeal and review, § 28.4 — Conclusiveness of rate order — Constitutionality.

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Rates, § 2 — Legislative function — Judicial review.

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Return, § 9 — Fair value basis.

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(BLACK, DOUGLAS, MURPHY, and FRANKFURTER, JJ., concur in separate opinions.)

[March 16, 1942.]

CERTIORARI *to the United States Circuit Court of Appeals for the Seventh Circuit to review judgment vacating order of the Federal Power Commission reducing natural gas rates; validity of order sustained and judgment reversed. For decision of Commission, see (1940) 35 PUR(NS) 41, and for decision of Circuit Court of Appeals, see (1941) 120 F(2d) 625, 38 PUR(NS) 257.*

Mr. Chief Justice STONE delivered the opinion of the court: This is a rate case involving numerous questions which arise out of the Federal Power Commission's regulation, under §§ 5(a) and 13 of the Natural Gas Act of [June 21] 1938, 52 Stat. at L. 821, Chap. 556, 15 USCA § 717, of the rates to be charged for the sale of natural gas by cross-petitioners,

Natural Gas Pipeline Company of America and Texoma Natural Gas Company.

The two companies are engaged in business as a single enterprise. They produce natural gas from their own reserves in the Panhandle gas fields in Texas, and purchase gas produced there by others. They transport the gas by their own pipe line in interstate commerce to Illinois, where they sell the bulk of it at wholesale to utilities, which distribute and sell it for domestic, commercial, and industrial uses.

The companies began operations in 1932 with a capital structure of $60,000,000 of 6 per cent bonds, later increased by $999,000, and $3,500,000 of common stock, of which $500,000 is stock of the Texoma Company, a nonprofit corporation paying no dividends on its stock. During the first seven years of operation, beginning January 1, 1932, and extending through 1938, the companies charged to gross income various depreciation and depletion deductions aggregating $13,077,488,[1] and in addition charged $6,481,322 for "retirements" of property. In that period they paid dividends amounting in all to $9,150,000. Although there were book deficits in earnings for the first two years, the total "net profit" available for dividends and surplus after payment of interest on the bonds was $8,224,436,[2] or an annual average of $1,174,919, which is 33.6 per cent per annum on the $3,500,000 stock. The earnings available during the period for return on the capital investment of both stockholders and bondholders—after taking out of income $19,558,810 for depreciation, depletion, and retirements—totalled $34,040,883; this makes an average of $4,862,983 annually, which is about 8 per cent on the book figures for investment undepreciated, or 8.8 per cent after deducting from investment the average depreciation and depletion reserves actually charged to earnings by the companies.[3] At the time of the hearing, over one-fourth of the bonds issued had been retired out of earnings.

On complaint of the Illinois Commerce Commission, and on its own motion, the Power Commission began separate investigations of the companies' rates. These proceedings were consolidated and after extensive hearings the Commission, for the purpose of issuing an interim order, accepted the companies' statement that the book cost of their property existing at the end of 1938 was $60,172,843, including working capital of $975,000. Likewise for the purpose of the order, it accepted the companies' estimate that the value of all physical property—calculated at reproduction cost new (except for gas reserves taken on the companies' statement to

[1] These charges against income are slightly in excess of the accumulated reserves for depreciation and depletion—$12,557,892—shown by the books at the end of 1938. The excess of $519,596 is apparently due to the fact that during the period $7,000,918 of property, on the basis of book cost, was retired; while the annual retirement charges had aggregated only $6,481,322. The balance of the retirements, $519,596, apparently had been charged to the depreciation and depletion accounts.

[2] This includes a negligible item, "nonoperating income," which for the 7-year period came to only $194,600.

[3] The book figures (which are on a cost basis) for invested capital average slightly under $61,000,000 if working capital is included. The depreciation and depletion reserves are taken from the accounts for which the aggregate figure, $12,557,892, is given in note 1, *supra*.

have a present value of $13,334,775) —was $74,420,424, which the Commission adopted as the rate base. It took the companies' own estimate of twenty-three years ending in 1954 as the life of the business, and for the amortization base used their cost figure of $78,284,009 for the total past and estimated future investment after deduction of estimated salvage. It calculated the "annual amortization expense" on that amount for the 23-year period, at a 6½ per cent sinking-fund interest rate, as $1,557,852, which it allowed.

The Commission also accepted, for the purpose of its interim order, the companies' estimate of prospective income available for amortization and return for the period 1939 to 1942 inclusive, as averaging $9,511,454 per annum. But making allowance for higher income tax rates under the Revenue Act of 1940, it found that the income available for amortization and return would be decreased to $9,362,032. It concluded that the companies' estimate of return, less the amortization allowance ($9,362,032 less $1,557,852),—or $7,804,180—exceeded the fair return, $4,837,328 (which is 6½ per cent of the rate base of $74,420,424), by $2,966,852, which amount was available for reduction of net revenues. Taking into account the decrease of $783,909 in Federal income taxes which would result from such a decline in revenues, the Commission decided there was a total of $3,750,000 annually available for reduction of rates. It found the existing rates were "unjust, unreasonable, and excessive," and made its interim order directing the companies to file a new schedule of rates and charges effective after September 1, 1940, which would bring about an annual reduction of $3,750,000 in operating revenues. The order also provided that the record should "remain open" for such further proceedings as the Commission may deem necessary or desirable.

On the companies' petition for review of the order pursuant to § 19 (b) of the act, 15 USCA § 717r(b) the court of appeals for the seventh circuit (1941) 120 F(2d) 625, 38 PUR(NS) 257, upheld the validity of the rate regulation provisions of the act, and the Commission's authority under the statute to issue the interim order directing reduction of the rates and requiring respondents to file new schedules reflecting that reduction. But the court vacated the Commission's order on the sole grounds that "going concern value" to the extent of $8,500,000 should have been included in the rate base, and that the amortization period for the entire property, instead of the full 23-year estimated life of the business taken by the Commission, should have been dated from the passage of the act or the time of the Commission's order.

We granted certiorari (1941) 314 US —, 86 L ed —, 62 S Ct 91, because of the novelty and importance of the questions presented upon the Commission's petition challenging the grounds of reversal below, and on the companies' cross petition assailing the constitutionality of the act, the authority of the Commission to make the interim order, the prescribed 6½ per cent return, the computation of the amortization allowance on the same rate of interest as the fair rate of return, and other features of the Com-

mission's order presently to be discussed.

The Natural Gas Act declares that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," and that Federal regulation of interstate commerce in natural gas "is necessary in the public interest." § 1(a), 15 USCA § 717 (a). The act directs that all rates and charges in connection with the transportation or sale of natural gas, subject to the jurisdiction of the Commission, shall be "just and reasonable" and declares to be unlawful any rate or charge which is not just and reasonable. § 4(a), 15 USCA § 717c (a). By § 5, 15 USCA § 717d, the Commission, on its own motion or the complaint of a state, municipality, state commission or gas distributing company, is empowered to investigate the rates charged by any natural gas company in connection with any transportation or sale of any natural gas subject to the jurisdiction of the Commission, and after a hearing to determine just and reasonable rates.

Constitutionality of the Act

[1–3] The argument that the provisions of the statute applied in this case are unconstitutional on their face is without merit. The sale of natural gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce, which is subject to regulation by Congress. Illinois Nat. Gas Co. v. Central Illinois Pub. Service Co. (1942) 314 US —, 86 L ed —, 62 S Ct 384. It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a state. The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the states under Fourteenth to regulate the prices of commodities in intrastate commerce. Compare United States v. Carolene Products Co. (1938) 304 US 144, 82 L ed 1234, 58 S Ct 778; United States v. Rock Royal Co-op. (1939) 307 US 533, 569, 83 L ed 1446, 59 S Ct 993; Sunshine Anthracite Coal Co. v. Adkins (1940) 310 US 381, 393, 84 L ed 1263, 60 S Ct 907; United States v. Darby (1941) 312 US 100, 85 L ed 609, 61 S Ct 451, 132 ALR 1430; with Nebbia v. New York (1934) 291 US 502, 78 L ed 940, 2 PUR(NS) 337, 54 S Ct 505, 89 ALR 1469; Olsen v. Nebraska ex rel. Western Reference & Bond Asso. (1941) 313 US 236, 85 L ed 1305, 61 S Ct 862, 133 ALR 1500.

The price of gas distributed through pipe lines for public consumption has been too long and consistently recognized as a proper subject of regulation under the Fourteenth Amendment to admit of doubts concerning the propriety of like regulation under the Fifth. Willcox v. Consolidated Gas Co. (1909) 212 US 19, 53 L ed 382, 29 S Ct 192, 48 LRA(NS) 1134, 15 Ann Cas 1034; Cedar Rapids Gas Light Co. v. Cedar Rapids (1912) 223 US 655, 56 L ed 594, 32 S Ct 389; California R. Commission v. Pacific Gas & E. Co. (1938) 302 US 388, 82 L ed 319, 21 PUR(NS) 480, 58 S Ct 334. And the fact that the distribution here involved is by wholesale rather than retail sales presents no dif-

ferences of significance to the protection of the public interest which is the object of price regulation. Cf. Illinois Nat. Gas Co. v. Central Illinois Pub. Service Co. *supra.* The business of cross-petitioners is not any the less subject to regulation now because the government has not seen fit to regulate it in the past. Cf. Nebbia v. New York, *supra.*

Validity of the Interim Order

[4, 5] The companies contend that the Federal Power Commission has no authority under the act to enter the type of order now under review, and that the order is invalid because the Commission did not itself fix reasonable rates as required by the act but instead merely directed the companies to file a new rate schedule which would result in the prescribed reduction in operating revenues. Section 5(a) of the act, 15 USCA § 717d(a) provides: "Whenever the Commission, after a hearing . . . , shall find that any rate . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate . . . and shall fix the same by order." It also contains a proviso that the Commission shall not have power to order an increase of rates on file unless in accordance with a new schedule filed by the company. But without mention of new rate schedules the proviso adds that the Commission "may order a decrease where existing rates are unjust . . . or are not the lowest reasonable rates." And § 16, 15 USCA § 717o, gives the Commission "power to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this act."

The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings. In this case, while the proceedings were not ended by the interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission. All the evidence tendered was received and considered by the Commission, and before the interim order was entered counsel for the companies stated to the Commission that they had concluded the direct testimony in support of their case. So far as the order is supported by the evidence the companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission. The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered. See New England Divisions Case (1923) 261 US 184, 201, 67 L ed 605, 43 S Ct 270.

The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to elim-

inate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the act would seem to be an appropriate means of carrying out its provisions. Section 5 of the act was modeled on the provisions of the Transportation Act, 49 USCA §§ 13, 15, which have been interpreted as giving to the Interstate Commerce Commission authority to establish a general level of rates and divisions in advance of a schedule to be filed by the carriers. See New England Divisions Case, *supra,* 201–203, n. 21, of 261 US. Cf. Sharfman v. The Interstate Commerce Commission, Vol. 2, pp. 381, 382; Driscoll v. Edison Light & P. Co. (1939) 307 US 104, 83 L ed 1134, 28 PUR(NS) 65, 59 S Ct 715.

We think that the proviso of § 5 already quoted contemplates that, when existing rates are found to be unjust and unreasonable, an order decreasing revenues may be filed without establishing a specific schedule of rates. Since such an order may be in the interests of the public, as well as the regulated company, and is in harmony with the purposes of the act, it is one which the Commission has discretion to make under § 16 as appropriate to carry out the provisions of the act.

The Scope of Judicial Review of Rates Prescribed by the Commission

[6–10] The ultimate question for our decision is whether the rate prescribed by the Commission is too low. The statute declares, § 4(a), 15 USCA § 717c(a) that the rates of natural gas companies subject to the act "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." Section 5(a) 15 USCA § 717d(a), directs the Commission to "determine the just and reasonable rate" to be observed and requires the Commission to "fix the same by order." It also provides that "the Commission may order a decrease where existing rates are unjust . . . unlawful, or are not the lowest reasonable rates." On review of the Commission's orders by a circuit court of appeals as authorized by § 19(b), 15 USCA § 717r(b) the Commission's findings of fact "if supported by substantial evidence, shall be conclusive."

By long-standing usage in the field of rate regulation the "lowest reasonable rate" is one which is not confiscatory in the constitutional sense. Los Angeles Gas & E. Corp. v. California R. Commission, 289 US 287, 305, 77 L ed 1180, PUR1933C 229, 53 S Ct 637; California R. Commission v. Pacific Gas & E. Co. *supra;* Denver Union Stock Yard Co. v. United States (1938) 304 US 470, 475, 82 L ed 1469, 24 PUR(NS) 155, 58 S Ct 990. Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate, see Banton v. Belt Line R. Corp. 268 US 413, 422, 69 L ed 1020, PUR 1926A 317, 45 S Ct 534; Columbus Gas & Fuel Co. v. Ohio Pub. Utilities Commission (1934) 292 US 398, 414, 78 L ed 1327, 4 PUR(NS) 152, 54 S Ct 763, 91 ALR 1403; Denver Union Stock Yard Co. v. United States, *supra,* the Commission is also free under § 5(a), 15 USCA § 717d(a) to decrease any rate which is not the "lowest reasonable rate." It follows that the congressional standard pre-

scribed by this statute coincides with that of the Constitution, and that the courts are without authority under the statute to set aside as too low any "reasonable rate" adopted by the Commission which is consistent with constitutional requirements.

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

Going Concern Value

[11–14] The companies insist that their business has a going concern value of $8,500,000 which the Commission did not include in the rate base and on which they are entitled to earn a return. In establishing the rate base for the purposes of the interim order the Commission "reluctantly" accepted the estimates of value, presented by the companies' own witnesses, as follows:

Reproduction cost new of physical properties (exclusive of gas reserves)	$56,302,250
Value of gas reserves as of June 1, 1939	13,334,775
Capital additions from June 1, 1939, to December 31, 1942	3,808,399
Working capital	975,000
Total Rate Base	$74,420,424

While no item for going concern value is separately stated in the rate base, the computation of cost new of physical equipment included—in addition to labor and cost of materials — large amounts for overhead, interest, taxes, administration, legal and supervisory charges, and expenses paid or incurred in assembling the plant as that of a going concern.

The Commission spoke of the rate base thus arrived at as "liberal" and as a "generous allowance." That the estimate of reproduction costs new is liberal is indicated by the circumstances that the companies' structure other than gas reserves were built in 1930–1931 at a time, as the record shows, of relatively high prices, and that their reproduction cost depreciated is greater than actual cost, which was about $50,000,000. And the allowed "present value" of leases as of June 1, 1939, $13,334,775, is approximately $4,000,000 more than book cost, even without taking into account a substantial reduction for depletion

[4] The estimates submitted by the companies stated that there should be deducted from this figure for "viewed depreciation" $2,866,758. However, in setting a rate base for the interim order, the Commission did not make this conceded deduction—perhaps because it held, contrary to the companies' contention, that the properties should be amortized over the entire life of the business.

[5] The companies estimated that the cost of additional property, not including replacements, during the future life of the enterprise, subsequent to June 1, 1939, would be $9,145,083. On this basis, they claimed that there should be included in the rate base $6,046,286, which they said would be the estimated average investment. The Commission included in the rate base only $3,808,399, which was the companies' estimated outlay for capital additions through the end of 1942. This reduction does not appear to be challenged. In any event, the refusal to include in the rate base capital expenditures not yet made cannot involve confiscation.

reserves of $1,152,854, which the companies had accrued on their own books by the end of 1938. The Commission declined to include going concern value as an additional item in the rate base.

The companies urge, as the court of appeals held, that there are items of cost or expense incurred in the establishment and development of the business during the 7-year period prior to regulation which were not included in the companies' estimate of value accepted by the Commission and which, in view of the special characteristics of the business, should be capitalized and added to the rate base to the extent of $8,500,000 for going concern value. They include, in amounts not now material, the following: expenditures for securing new business; interest on money invested in nonproductive plant capacity; taxes paid on nonproductive capacity; fixed operating expenses attributable to nonproductive capacity, and depreciation on nonproductive capacity.[6] The companies' contentions with respect to all these items are predicated upon the limited life of the business, twenty-three years, and on testimony that in anticipation of its growth larger gas mains and facilities were constructed than were required during the earlier years of the business. The reproduction cost new of this excess of equipment is admittedly included in the rate base.

None of these items appears in the companies' capital account. With the possible exception of expenditures for securing new business, they are synthetic figures arrived at by estimating the amount of expense attributable to the current cost of maintenance of the excess capacity of the plant during periods when the excess capacity was not used. But the interest charges, taxes, and other costs of maintaining this excess capacity during the period when not in use have not been capitalized by the companies on their books and so far as appears were paid from current earnings. The same is true of the expenditure for advertising and other expenses of acquiring new business.

The novel question is thus presented whether confiscation, proscribed by Congress as well as the Constitution, results from the exclusion from the rate base of the previous costs of maintaining excess plant capacity and of getting new business. The Commission gave full consideration to this contention. It said: "The companies' claim for $8,500,000 for going concern value must be disallowed. The amount obviously is an arbitrary claim, not supported by substantial evidence warranting its allowance. Its allowance would mean the acceptance of a deceptive fiction, resulting in an unfair imposition upon consumers. We are convinced that we are allowing in our rate base more than an adequate amount to cover all elements of value."

There is no constitutional requirement that going concern value, even when it is an appropriate element to be included in a rate base, must be separately stated and appraised as such.

[6] The item for depreciation on nonproductive capacity amounting to $382,833 is obviously provided for in the Commission's allowance for depreciation. The value of the companies' entire plant, whether fully productive or not, is included in the rate base and, as will presently appear, provision was made by the Commission's order for its amortization on a cost basis from earnings.

This court has often sustained valuations for rate purposes of a business assembled as a whole without separate appraisal of the going concern element. Columbus Gas & Fuel Co. v. Ohio Pub. Utilities Commission, *supra;* Dayton Power & Light Co. v. Ohio Pub. Utilities Commission (1934) 292 US 290, 309, 78 L ed 1267, 3 PUR(NS) 279, 54 S Ct 647; Denver Union Stock Yard Co. v. United States, *supra;* Driscoll v. Edison Light & P. Co. *supra.* When that has been done the burden rests on the regulated company to show that this item has neither been adequately covered in the rate base nor recouped from prior earnings of the business. Des Moines Gas Co. v. Des Moines, 238 US 153, 166, 59 L ed 1244, PUR1915D 577, 35 S Ct 811.

The total value of the companies' plant, including equipment in excess of immediate needs when beginning business, has been included in the rate base adopted. If rightly included, as the Commission has assumed for purposes of the order, the companies would have been entitled to earn a fair return upon its value, had the business been regulated from the start. But it does not follow that the companies' property would be confiscated by denying to them the privilege of capitalizing the maintenance cost of excess plant capacity, which would allow them to earn a return and amortization allowance upon such costs during the entire life of the business. It is only on the assumption that excess capacity is a part of the utility's equipment used and useful in the regulated business, that it can be included as a part of the rate base on which a return may be earned. When so included the utility gets its return not from capitalizing the maintenance cost, but from current earnings by rates sufficient, having in view the character of the business, to secure a fair return upon the rate base provided the business is capable of earning it. But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. Galveston Electric Co. v. Galveston, 258 US 388, 66 L ed 678, PUR1922D 159, 42 S Ct 351; San Diego Land & Town Co. v. Jasper (1903) 189 US 439, 446, 47 L ed 892, 23 S Ct 571. The deficiency may not be thus added to the rate base for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business.

Here the companies, though unregulated, always treated their entire original investment, together with subsequent additions, as capital on which profit was to be earned. They charged the out-of-pocket cost of maintenance of plant, whether used to capacity or not, as operating expenses deductible from earnings before arriving at net profits. They have thus treated the items now sought to be capitalized in the rate base as operating expenses to be compensated from earnings, as in the case of regulated companies. The history of the first seven years of operation before regulation shows an average annual return, after deduction of operating expenses, of approx-

imately 8 per cent on the undepreciated investment.[7] This high return was earned during a period which included the severest depression in our history.

Whether there is going concern value in any case depends upon the financial history of the business. Houston v. Southwestern Bell Teleph. Co. 259 US 318, 325, 66 L ed 961, PUR 1922D 793, 42 S Ct 486. This is peculiarly true of a business which derives its estimates of going concern value from a financial history preceding regulation. That history here discloses no basis for going concern value, both because the elements relied upon for that purpose could rightly be rejected as capital investment in the case of a regulated company, and because in the present case it does not appear that the items, which have never been treated as capital investment, have not been recouped during the unregulated period.

We cannot say that the Commission has deprived the companies of their property by refusing to permit them to earn for the future a fair return and amortization on the costs of maintenance of initial excess capacity —costs which the companies fail to show have not already been recouped from earnings before computing the substantial "net profits" earned during the first seven years. The items for advertising and acquiring new business have been treated in the same way by the companies and do not in the circumstances of this case stand on any different footing. Cf. West Ohio Gas Co. v. Ohio Pub. Utilities Commission (1935) 294 US 63, 72, 79 L ed 761, 6 PUR(NS) 449, 55 S Ct 316.

[7] Besides $8,244,435 of "net profits," the companies paid out of gross income $23,994,030 as interest on the bonds.

The Amortization Base

[15, 16] The Commission took as the amortization base the sum of $78,284,009. This was made up of the companies' total investment, at the end of 1938, of $67,173,761 (without deduction of property retirements already made), plus estimated future capital additions through 1954, including replacements, amounting to $12,159,380,[8] less estimated salvage at the predicted end of the project in 1954. It is not questioned that the Commission's annual amortization allowance of $1,557,852, accumulated at the sinking fund interest rate of 6½ per cent adopted by the order, will be sufficient in 1954 to restore the capital investment so computed.

The companies argue that the amortization base, computed on a basis of reproduction cost, should be $84,341,218[9] rather than cost plus estimated future capital additions. But the purpose of the amortization allowance and its justification is that it is a means of restoring from current earnings the amount of service capacity of the business consumed in each year. Lindheimer v. Illinois Bell Teleph. Co.

[8] We do not intimate any approval of the inclusion in the amortization base of all the estimated future capital additions.

[9] The companies' proposed amortization base was mdae up of the following items:

Reproduction cost new, excluding gas reserves	$56,302,250
Viewed depreciation (deduct)	2,866,758
Value of gas reserves	13,334,775
Cost of additional property	9,145,083
Going concern value	8,500,000
Working capital	975,000
	$85,390,350
Less salvage	1,049,132
	$84,341,218

(1934) 292 US 151, 167, 78 L ed 1182, 3 PUR(NS) 337, 54 S Ct 658. When the property is devoted to a business which can exist for only a limited term, any scheme of amortization which will restore the capital investment at the end of the term involves no deprivation of property. Even though the reproduction cost of the property during the period may be more than its actual cost, this theoretical accretion to value represents no profit to the owner since the property dedicated to the business, save for its salvage value, is destined for the scrap-heap when the business ends. The Constitution does not require that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it. We need not now consider whether, as the government urges, there can in no circumstances be a constitutional requirement that the amortization base be the reproduction value rather than the actual cost of the property devoted to a regulated business. Cf. United R. & Electric Co. v. West, 280 US 234, 265, 74 L ed 390, PUR1930A 225, 50 S Ct 123. It is enough that here the business by hypothesis will end in 1954, and that the amortization base, computed at cost and including property already retired, will be completely restored by 1954 by the annual amortization allowances. As the Commission declared (1940) 35 PUR (NS) 41, 51: "The amounts of amortization are recognized and treated as operating expenses. Operating expenses are stated on the basis of cost. . . . We refuse to make an allowance of amortization in excess of cost. To do so would not be the computation of a proper expense, but instead the allowance of additional profit over and above a fair return. Manifestly such an additional return would unjustly penalize consumers."

The Amortization Period

[17] The court below held that, Since the business was unregulated for the first seven years, the adoption by the Commission of the estimated 23-year life of the business as the amortization period involved a denial of due process. In view of the estimate by the Commission and the companies that the gas properties would be exhausted in about sixteen years from the date of the act, the court thought, as the companies argue, that a rate of return would be confiscatory which would not provide, in addition to a fair return, an annual amortization allowance sufficient to restore the total investment over the final 16-year period. But this argument overlooks the fact that the depreciation of physical property attributed to use, and the obsolescence of the entire property attributable to lapse of time in the case of a business having a limited life, had been taking place during the seven years before regulation and that those items must be recouped if at all from earnings. Capital investment loss at the end of the life of a business can only be avoided by restoration of the investment from earnings, and is avoidable so far as is humanly possible only by an appropriate charge of amortization to earnings as they accrue.

Here there is no question but that the Commission's annual amortization allowance, if applied over the entire 23-year life of the business, is sufficient to restore the total capital investment at the end, or that earnings of

the past and those estimated for the future together are sufficient to provide for the amortization allowance and a fair return, given an appropriate rate base and rate of return. Making that assumption we cannot say that adequate provision has not been made for restoration of the companies' investment from earnings and a fair return on the investment. Even though the companies were unregulated for seven years, earnings during that period were available and adequate for amortization. In fact the companies' charges to earnings, for depreciation, depletion and retirements, totalled $19,558,810, or an average of $2,794,115 per annum. This was in conformity with the established business practice, in the case of unregulated as well as regulated businesses, to make such a depreciation or amortization allowance chargeable annually to earnings as an operating expense in order to provide adequately for annual consumption of capital in the business. Lindheimer v. Illinois Bell Teleph. Co. *supra.*

The companies are not deprived of property by a requirement that they credit in the amortization account so much of the earnings received during the prior period as are appropriately allocable to it for amortization. Only by that method is it possible to determine the amount of earnings which may justly be required for amortization during the remaining life of the business.

Amortization Interest Rate

[18] The annual amortization allowances of $1,557,852, if accumulated at a 6½ per cent compound interest rate until the assumed exhaustion of the gas reserves in 1954, will be sufficient to restore the undepreciated total investment less the salvage value of the property. The companies urge that the interest rate should have been lower, say 2 per cent, on the assumption that only some such lower rate would be earned by a hypothetical sinking fund to be created from the annual amortization allowances. But the argument ignores the fact that the amortization method adopted by the Commission contemplates not a sinking fund of segregated securities purchased with cash withdrawn from the business, but merely a sinking fund reserve charged to earnings and not distributable as ordinary dividends. Under this method there is no deduction of the amortization allowances from the rate base on which a fair return—6½ per cent under the current interim order—is to be allowed during the life of the business.

The companies are thus allowed to earn in each year, in addition to the amortization allowance, 6½ per cent on both the amortized and the unamortized portions of the base. If the amortization interest were computed at a 2 per cent rate without deducting the amortized portion from the rate base, the companies would continue to receive a 6½ per cent instead of only a 2 per cent return on that portion of the investment. True, the method of amortization adopted means that the companies look to the earnings of the business for the hypothetical interest on amortization reserve. This it is argued may involve more business risk than a method of amortization contemplating the actual withdrawal from the business of the amortization allowances and their investment in segre-

gated securities bearing a lower rate of interest. But here the 6½ per cent rate of return allowed on the amortized portion of the rate base includes compensation for the business risk, and the risk is an incident of the business in which the companies have hazarded their capital and in which they propose to invest additional capital. The Commission declared it adopted this method to avoid the inequitable result which would follow if the companies were permitted to include in their charges to the public 6½ per cent on the amortized portion of the base, while treating it as earning only 2 per cent. The Commission's conclusion that this is an appropriate method is supported by the evidence, and in any case it does not appear that it has deprived or will deprive the companies of property.

Fair Rate of Return

[19, 20] The Commission found that "6½ per cent is a fair annual rate of return upon the rate base allowed," which it had characterized as "a generous allowance." The courts are required to accept the Commission's findings if they are supported by substantial evidence. § 19(b), 15 USCA § 717r(b). We cannot say on this record that the Commission was bound to allow a higher rate.

The evidence shows that profits earned by individual industrial corporations declined from 11.3 per cent on invested capital in 1929 to 5.1 per cent in 1938. The profits of utility corporations declined during the same period from 7.2 per cent to 5.1 per cent. For railroad corporations the decline was from 6.4 per cent to 2.3 per cent. Interest rates were at a low level on all forms of investment and among the lowest that have ever existed. The securities of natural gas companies were sold at rates of return of from 3 per cent to 6 per cent with yields on most of their bond issues between 3 per cent and 4 per cent. The interest on large loans ranged from 2 per cent to 3.25 per cent.

The regulated business here seems exceptionally free from hazards which might otherwise call for special consideration in determining the fair rate of return. Substantially all its product is distributed in the metropolitan area of Chicago, a stable and growing market, through distributing companies which own 26 per cent of the investment of the Natural Gas Pipeline Company. Ninety per cent of its gas is taken under contract by the Chicago District Pipeline Company. The contract runs until 1946 or until 1951, at the option of the companies. Under it the District Company is bound to take, or at least pay for, 66⅔ per cent of the companies' gas, and performance is guaranteed by the three companies distributing the gas in Chicago.

The danger of early exhaustion of the gas field was fully taken into account in the estimate of its life and the companies' estimate was accepted. Provision for the complete amortization of the investment within that period affords a security to the investment which is lacking to those industries whose capital investments must be continued for an indefinite period. The companies' affiliation with the six large corporations which directly or indirectly own all the stock places them in a strong position for their future financing. The business is in the same position as other similar businesses

with respect to increased taxation, inflation and costs of operation. Other factors such as credit risks, risks of technological changes, varying demands for product, relatively small labor requirements, and conversion of inventory into cash compare more favorably. After a full consideration of all of these factors and of expert testimony, the Commission concluded that the prescribed reduction in revenues was just and reasonable, and that the 6½ per cent was a fair rate of return.

Disposition of Excess Charges Collected Since the Commission's Order

[21] The circuit court of appeals stayed the Commission's order pending appeal. The companies state that as a condition of the stay the court required them to give a bond in the sum of $1,000,000 conditioned upon their refund of excess charges to customers, in the event that the Commission's order should be sustained. The bond is not in the record and its precise terms are not before us.

The companies point out that substantially all the gas affected by the reduction in revenues is sold to wholesalers who distribute it for ultimate consumption. They argue that the purpose of the rate regulation is the protection of consumers, and that the purposes of the act will not be effectuated by the refunds to wholesalers. They insist that such refunds, being the wholesalers' profits from past business, cannot be resorted to for reducing future rates to the consumers. Cf. Knoxville v. Knoxville Water Co. (1909) 212 US 1, 14, 53 L ed 371, 29 S Ct 148; Galveston Electric Co. v. Galveston, *supra*.

Of this contention it is enough to say that the question of the disposition of the excess charges is not before us for determination on the present record. Cf. Morgan v. United States (1938) 304 US 1, 26, 82 L ed 1129, 1135, 23 PUR(NS) 339, 346, 58 S Ct 773, 999. Amounts collected in excess of the Commission's order are declared to be unlawful by § 4(a) of the act, 15 USCA § 717c(a). If there is any basis, either in the bond or the circumstances relied upon by the companies, for not compelling the companies to surrender these illegal exactions, it does not appear from the record.

We have considered but find it unnecessary to discuss other objections of lesser moment to the Commission's order. We sustain the validity of the order and reverse the judgment below.

Reversed.

Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY, concurring:

I

We concur with the court's judgment that the rate order of the Federal Power Commission, issued after a fair hearing upon findings of fact supported by substantial evidence, should have been sustained by the court below. But in so far as the court assumes that, regardless of the terms of the statute, the due process clause of the Fifth Amendment grants it power to invalidate an order as unconstitutional because it finds the charges to be unreasonable, we are unable to join in the opinion just announced.

Rate making is a species of price fixing. In a recent series of cases, this court has held that legislative price

fixing is not prohibited by the due process clause.[1] We believe that in so holding, it has returned in part at least to the constitutional principles which prevailed for the first hundred years of our history. Munn v. Illinois (1877) 94 US 113, 24 L ed 77; Peik v. Chicago & N. W. R. Co. (1877) 94 US 164, 24 L ed 97. Cf. McCart v. Indianapolis Water Co. (1938) 302 US 419, 427, 428, 82 L ed 336, 21 PUR(NS) 465, 58 S Ct 324. The Munn and Peik Cases, decided in 1877, *supra,* Justices Field and Strong dissenting, emphatically declared price fixing to be a constitutional prerogative of the legislative branch, not subject to judicial review or revision.

In 1886, four of the Justices who had voted with him in the Munn and Peik Cases no longer being on the court, Chief Justice Waite expressed views in an opinion of the court which indicated a yielding in part to the doctrines previously set forth in Mr. Justice Field's dissenting opinions, although the decision, upholding a state regulatory statute, did not require him to reach this issue. See Railroad Commission Cases [Stone v. Farmers Loan & Trust Co.] (1886) 116 US 307, 331, 29 L ed 636, 6 S Ct 334, 388, 1191. For an interesting discussion of the evolution of this change of position, see Swisher, Stephen J. Field, 372–392. By 1890, six Justices of the 1877 court, including Chief Justice Waite, had been replaced by others. The new court then clearly repudiated the opinion expressed for the court by Chief Justice Waite in the Munn and Peik Cases, in a holding which accorded with the views of Mr. Justice Field. Chicago, M. & St. P. R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission (1890) 134 US 418, 33 L ed 970, 10 S Ct 462. Under those views, first embodied in a holding of this Court in 1890, "due process" means no less than "reasonableness judicially determined."[2] In accordance with this elastic meaning which, in the words of Mr. Justice Holmes, makes the sky the limit[3] of judicial power to declare legislative acts unconstitutional, the conclusions of judges, substituted for those of legislatures, become a broad and varying standard of constitutionality.[4] We shall not attempt now to set out at length the rea-

[1] Some of these cases arose under the Fifth, some under the Fourteenth Amendment. Nebbia v. New York (1934) 291 US 502, 78 L ed 940, 2 PUR(NS) 337, 54 S Ct 505, 89 ALR 1469 [state statute authorizing a milk control board to fix minimum and maximum retail prices for milk]; Mulford v. Smith (1939) 307 US 38, 83 L ed 1092, 59 S Ct 648 [Federal statute imposing penalties on tobacco auction warehousemen for marketing tobacco in excess of prescribed quota]; United States v. Rock Royal Co-op. (1939) 307 US 533, 83 L ed 1446, 59 S Ct 993 [Federal statute authorizing Secretary of Agriculture to fix minimum prices to be paid producers for milk sold to dealers]; Sunshine Anthracite Coal Co. v. Adkins (1940) 310 US 381, 84 L ed 1263, 60 S Ct 907 [Federal statute authorizing Bituminous Coal Commission to fix maximum and minimum prices for bituminous coal]; United States v. Darby (1941) 312 US 100, 85 L ed 609, 61 S Ct 451, 132 ALR 1430 [Federal statute fixing minimum wages (and maximum hours) for employees engaged in production of goods for interstate commerce]; Olsen v. Nebraska ex rel. Western Reference & Bond Asso. (1941) 313 US 236, 85 L ed 1305, 61 S Ct 862, 133 ALR 1500 [State statute fixing maximum compensation to be collected by private employment agencies].

[2] Polk Co. v. Glover (1938) 305 US 5, 12, 19, 83 L ed 6, 59 S Ct 15. Cf. Chambers v. Florida (1940) 309 US 227, 235, 238, 84 L ed 716, 60 S Ct 472.

[3] "As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable." Baldwin v. Missouri (1930) 281 US 586, 595, 74 L ed 1056, 50 S Ct 436.

[4] To hold that the Fourteenth Amendment was intended to and did provide protection from state invasions of the right of free speech and other clearly defined protections contained

sons for our belief that acceptance of such a meaning is historically unjustified and that it transfers to courts powers which, under the Constitution, belong to the legislative branch of government. But we feel that we must record our disagreement from an opinion which, although upholding the action of the Commission on these particular facts, nevertheless gives renewed vitality to a "constitutional" doctrine which we are convinced has no support in the Constitution.

The doctrine which makes of "due process" an unlimited grant to courts to approve or reject policies selected by legislatures in accordance with the judges' notion of reasonableness had its origin in connection with legislative attempts to fix the prices charged by public utilities. And in no field has it had more paralyzing effects.[5]

II

We have here, to be sure, a statute which expressly provides for judicial review. Congress has provided in § 5 of the Natural Gas Act, 15 USCA § 717d, that the rates fixed by the Commission shall be "just and reasonable." The provision for judicial review states that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Section 19(b), 15 USCA § 717r(b). But we are not satisfied that the opinion of the court properly delimits the scope of that review under this act. Furthermore, since this case starts a new chapter in the regulation of utility rates, we think it important to indicate more explicitly than has been done the freedom which the Commission has both under the Constitution and under this new statute. While the opinion of the court erases much which has been written in rate cases during the last half century, we think this is an appropriate occasion to lay the ghost of Smyth v. Ames (1898) 169 US 466, 42 L ed 819, 18 S Ct 418, which has haunted utility regulation since 1898. That is especially desirable lest the reference by the majority to "constitutional requirements" and to "the limits of due process" be deemed to perpetuate the fallacious "fair value" theory of rate making in the limited judicial review provided by the act.

Smyth v. Ames held (pp. 546–547) that "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and the market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed

in the Bill of Rights, Milk Wagon Drivers Union v. Meadowmoor Dairies (1941) 312 US 287, 301, 302, 85 L ed 836, 61 S Ct 552, 132 ALR 1200, is quite different from holding that "due process," an historical expression relating to procedure, Chambers v. Florida, *supra*, confers a broad judicial power to invalidate all legislation which seems "unreasonable" to courts. In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.

[5] McCart v. Indianapolis Water Co. *supra*.

by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

(1) This theory derives from principles of eminent domain. See Mr. Justice Brewer, Ames v. Union P. R. Co. (1894) 64 Fed 165, 177; West v. Chesapeake & P. Teleph. Co. (1935) 295 US 662, 671, 79 L ed 1640, 8 PUR(NS) 433, 55 S Ct 894; Hale, Conflicting Judicial Criteria of Utility Rates, 38 Columbia L. Rev. 959. In condemnation cases the "value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner." Monongahela Nav. Co. v. United States (1893) 148 US 312, 328, 329, 37 L ed 463, 13 S Ct 622. Cf. Consolidated Rock Products Co. v. Du Bois (1941) 312 US 510, 525, 526, 85 L ed 982, 61 S Ct 675. But those principles have no place in rate regulation. In the first place, the value of a going concern in fact depends on earnings under whatever rates may be anticipated. The present fair value rule creates but offers no solution to the dilemma that value depends upon the rates fixed and the rates upon value. See Mr. Justice Brandeis, Missouri ex rel Southwestern Bell Teleph. Co. v. Public Service Commission, 262 US 276, 292, 67 L ed 981, PUR 1923C 193, 43 S Ct 544, 31 ALR 807; Hale, The Fair Value Merry-Go-Round, 33 Illinois L. Rev. 517; 2 Bonbright, Valuation of Property, pp. 1094 et seq. In the second place, when property is taken under the power of eminent domain the owner is "entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken." United States v. New River Collieries Co. (1923) 262 US 341, 343, 67 L ed 1014, 43 S Ct 565. But in rate making the owner does not have any such protection. We know without attempting any valuation that if earnings are reduced the value will be less. But that does not stay the hand of the legislature or its administrative agency in making rate reductions. As we have said, rate making is one species of price fixing. Price fixing, like other forms of social legislation, may well diminish the value of the property which is regulated. But that is no obstacle to its validity. As stated by Mr. Justice Holmes in Block v. Hirsh (1921) 256 US 135, 155, 65 L ed 865, 41 S Ct 458, 16 ALR 165: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which

property rights may be cut down, and to that extent taken, without pay." Somewhat the same view was expressed in Nebbia v. New York (1934) 291 US 502, 532, 78 L ed 940, 2 PUR(NS) 337, 349, 54 S Ct 505, 89 ALR 1469, where this court said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. Munn v. Illinois (1877) 94 US 113, 24 L ed 77." Explicit recognition of these principles will place the problems of rate making in their proper setting under this statute.

(2) The rule of Smyth v. Ames (1898) 169 US 466, 42 L ed 819, 18 S Ct 418, as construed and applied, directs the rate-making body in forming its judgment as to "fair value" to take into consideration various elements—capitalization, book cost, actual cost, prudent investment, reproduction cost. See Mr. Justice Brandeis, Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, *supra*. But as stated by Mr. Justice Brandeis, PUR1923C at p. 205: "Obviously 'value' cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different; and must, when applied in a particular case, lead to widely different results. The rule of Smyth v. Ames, as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes the determination. Whether a desired result is reached may depend upon how any one of many elements is treated." The risks of not giving weight to reproduction cost have been great. Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, *supra;* St. Louis & O'Fallon R. Co. v. United States, 279 US 461, 73 L ed 798, PUR1929C 161, 49 S Ct 384. The havoc raised by insistence on reproduction cost is now a matter of historical record. Mr. Justice Brandeis in the Southwestern Bell Telephone Case demonstrated how the rule of Smyth v. Ames has seriously impaired the power of rate-regulation and how the "fair value" rule has proved to be unworkable by reason of the time required to make the valuations, the heavy expense involved, and the unreliability of the results obtained.[6] And see Mr. Justice Brandeis concurring, St. Joseph Stock Yards Co. v. United States (1936) 298 US 38, 73,

[6] "The relation between the public utility and the community cannot be expressed in terms of a simple, quantitatively ascertainable fact, for the relation involves numerous and complex factors which depend on compromise and practical adjustment rather than on deductive logic. The whole doctrine of Smyth v. Ames rests upon a gigantic illusion. The fact which for twenty years the court has been vainly trying to find does not exist. 'Fair value' must be shelved among the great juristic myths of history, with the Law of Nature and the Social Contract. As a practical concept, from which practical conclusions can be drawn, it is valueless." Henderson, Railway Valuation and the Courts, 33 Harvard L. Rev. 1031, 1051.

80 L ed 1033, 14 PUR(NS) 397, 56 S Ct 720; dissenting opinion, McCart v. Indianapolis Water Co. (1938) 302 US 419, 423 et seq., 82 L ed 336, 21 PUR(NS) 465, 58 S Ct 324; Mr. Justice Stone dissenting, West v. Chesapeake & P. Teleph. Co. *supra*. The result of this court's rulings in rate cases since Smyth v. Ames has recently been summarized as follows: "Under the influence of these precedents, commission regulation has become so cumbersome and so ineffective that it may be said, with only slight exaggeration, to have broken down. Even the investor,[7] on whose behalf the constitutional safeguards have been developed, has received no protection against the rebounds from the inflated stockmarket prices that are stimulated by the 'fair-value' doctrine." Bonbright, op. cit. p. 1154.

As we read the opinion of the court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of "fair value." The Commission may now adopt, if it chooses, prudent investment as a rate base—the base long advocated by Mr. Justice Brandeis. And for the reasons stated by Mr. Justice Brandeis in the Southwestern Bell Telephone Case there could be no constitutional objection if the Commission adhered to that formula and rejected all others.

Yet it is important to note, as we have indicated, that Congress has merely provided in § 5 of the Natural Gas Act, 15 USCA § 717d, that the rates fixed by the Commission shall be "just and reasonable." It has provided no standard beyond that. Congress, to be sure, has provided for judicial review. But § 19(b), 15 USCA § 717r(b) states that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." In view of these provisions we do not think it is permissible for the courts to concern themselves with any issues as to the economic merits of a rate base. The Commission has a broad area of discretion for selection of an appropriate rate base. The requirements of "just and reasonable" embrace among other factors two phases of the public interest: (1) the investor interest; (2) the consumer interest. The investor interest is adequately served if the utility is allowed the opportunity to earn the cost of the service. That cost has been defined by Mr. Justice Brandeis as follows: "Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital." Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 US 276, 291, 67 L ed 981, PUR1923C 193, 202, 43 S Ct 544, 31 ALR 807. Irrespective of what the return may be on "fair value," if the rate permits the

[7] "Such valuation proceedings, as heretofore conducted, are excessively costly, require a long period of time, affect adversely the corporation's credit, interfere with its financing upon favorable terms, and frequently cause the postponement of extensions and improvements to the great detriment of the public. Unless and until there is some change in the legal principles which must be applied in determining fair value, however, the industry cannot escape from this situation." Report of the Committee on Valuation, American Electric Railway Assoc., 1924, p. 20.

company to operate successfully and to attract capital all questions as to "just and reasonable" are at an end so far as the investor interest is concerned. Various routes to that end may be worked out by the expert administrators charged with the duty of regulation. It is not the function of the courts to prescribe what formula should be used. The fact that one may be fair to investors does not mean that another would be unfair. The decision in each case must turn on considerations of justness and fairness which cannot be cast into a legalistic formula. The rate of return to be allowed in any given case calls for a highly expert judgment. That judgment has been entrusted to the Commission. There it should rest.

One caveat however should be entered. The consumer interest cannot be disregarded in determining what is a "just and reasonable" rate. Conceivably a return to the company of the cost of the service might not be "just and reasonable" to the public. The correct principle was announced by this court in Covington & L. Turnpike Road Co. v. Sandford (1896) 164 US 578, 596, 41 L ed 560, 17 S Ct 198:

"It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interest are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Cf. Chicago & G. T. R. Co. v. Wellman (1892) 143 US 339, 345, 36 L ed 176, 12 S Ct 400; United Gas Pub. Service Co. v. Texas (1938) 303 US 123, 150, 82 L ed 702, 22 PUR(NS) 113, 58 S Ct 483.

This problem carries into a field not necessary to develop here. It reëmphasizes however that the investor interest is not the sole interest for protection. The investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment though fair to investors would be grossly unfair to the consumers. The possibility of that collision reinforces the view that the problem of rate making is for the administrative experts not the courts and that the ex post facto function previously performed by the courts should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review. That review should be as confined and restricted as the review, under similar statutes, of

orders of other administrative agencies.

Mr. Justice FRANKFURTER, concurring: I wholly agree with the opinion of the Chief Justice.

Congress has in the Natural Gas Act specifically cast upon courts the duty to review orders of the Federal Power Commission fixing "just and reasonable" rates. The constitutional scope of judicial review of rate orders where Congress has denied judicial review is therefore not in issue in this case. Discussion of the problem is academic, especially since we all concur in the Chief Justice's conclusions on the rate order here made by the Commission. But since the issue has been stirred, I add a few words because legal history still has its claims.

While the doctrine of "confiscation," as a limitation to be enforced by the judiciary upon the legislative power to fix utility rates, was first applied in Chicago, M. & St. P. R. Co. v. Minnesota ex rel. R. & Warehouse Commission (1890) 134 US 418, 33 L ed 970, 10 S Ct 462, 3 Inters Com Rep 209, that decision followed principles expounded in Stone v. Farmers' Loan & Trust Co. (1886) 116 US 307, especially at 331, 29 L ed 636, 6 S Ct 334, 388, 1191. See 134 US at pp. 455, 456. Mr. Chief Justice Waite, who delivered the opinion in the Stone Case as well as in the earlier decision in Munn v. Illinois (1877) 94 US 113, 24 L ed 77, was therefore the author of the doctrine of "confiscation" and its corollary, "judicial review." His view was shared by such stout respecters of legislative power over utilities as Mr. Justice Miller (see Fairman, Mr. Justice Miller and the Supreme Court, passim), Mr. Justice Bradley (see his dissent in Chicago, M. & St. P. R. Co. v. Minnesota ex rel. R. & Warehouse Commission, *supra,* at p. 461 of 134 US), and Mr. Justice Harlan. The latter, indeed, agreed with Mr. Justice Field that the regulatory power exercised in the Railroad Commission Cases (1886) 116 US 307, 29 L ed 636, 6 S Ct 334, 388, 1191, constituted an impairment of the obligation of contract. By no one was the doctrine of judicial review more emphatically accepted, and applied in favor of a public utility, than by Mr. Justice Harlan in the decision and opinion in Covington & L. Turnpike Road Co. v. Sandford (1896) 164 US 578, especially at 591, 595, 41 L ed 560, 17 S Ct 198.

But while this historic controversy over the constitutional limitations upon the power of courts in rate cases is not presented here, if it be deemed that courts have nothing to do with rate making because that task was committed exclusively to the Commission, surely it is a usurpation of the Commission's function to tell it how it should discharge this task and how it should protect the various interests that are deemed to be in its and not in our keeping.

WYOMING SUPREME COURT

Rural Electric Company

v.

State Board of Equalization et al.

[No. 2210.]

(— Wyo —, 120 P(2d) 741.)

Statutes, § 11 — Construction — Exceptions — Public utility status.

1. The legislature, by excepting certain organizations or persons from the public utility category, indicates an intention to include within the meaning of "public utility" those not specifically excepted, in view of the settled principle that when the legislature has made exceptions to a general rule, it must be deemed to have included in its exceptions all that it intended to except, p. 157.

Public utilities, § 58 — Status of associations — Rural electrification company.

2. An electrical corporation organized to furnish electricity to its members only, not organized for gain, having no capital stock, borrowing money from the Rural Electrification Administration of the Federal government in order to build its plant and equipment, soliciting farmers in the territory in which it operates to become members (with certain exceptions), and in position to compete with public utilities, is a public utility within the meaning of a sales tax law applicable to public utilities, gas, electric, and heat corporations, p. 157.

Procedure, § 36 — Stare decisis — Rulings of Commission — Recognition by court.

3. Widespread public opinion as evidenced by Commissions and legislatures as to the public utility status of membership electric corporations, while not controlling on courts, would at least cause a court to hesitate to announce a contrary rule, p. 162.

Public utilities, § 14 — Dedication to public use.

4. Dedication to public use does not depend solely upon the wishes and the declarations of the owner of property, although such an owner must at least have undertaken actually to engage in business and supply at least some of his commodity to some of the public, p. 162.

Public utilities, § 73 — Status of electric plant.

5. Supplying electricity is recognized as a service in which the public may be interested, and which, accordingly, may be impressed with a public character, in the absence of countervailing reasons, p. 162.

Public utilities, § 42 — Test of status — Number of customers.

6. The number of customers, although not a criterion in determining public utility status, is one of the natural criteria in determining the question whether or not a business constitutes a public utility, p. 162.

Public utilities, § 30 — Dedication to public service — Test of status — Eminent domain — Submission to regulation.

7. The fact of dedication to the public, as well as the right to demand service on the part of the public generally, may be shown by explicit profession or indirectly by indiscriminate service or solicitation, by the exercise of the right of eminent domain, by voluntary submission to regulation, and by perhaps other facts, although some of these facts may not be controlling, p. 162.

Public utilities, § 24 — Test of status — Contracts — Refusal of service.

8. The fact that an owner enters into contracts in connection with his service, and in some instances refuses service, is not a controlling factor in determining public utility status, p. 168.

Public utilities, § 58 — Limited membership organization.

9. Limited membership in an organization furnishing electric service is but another form of an attempted limitation by contract and is subject to the rule that the making of contracts for service, and in some instances refusing service, is not a controlling factor in determining public utility status, p. 168.

Public utilities, § 32.1 — Test of status — Monopoly.

10. The fact that a membership organization has a monopoly in the rural portion of the territory in which it operates an electric system is a factor to be taken into consideration in determining public utility status, p. 168.

Public utilities, § 32.1 — Test of status — Competition.

11. Contact with a public utility and ability to compete with it ought not to be ignored, in determining the question of public utility status of a membership corporation, p. 168.

Public utilities, § 30 — Test of status — Eminent domain powers.

12. The fact that a membership corporation has the power of eminent domain, although not determinative of its status as a public utility, is a factor which may be taken into consideration, p. 168.

Public utilities, § 48 — Test of status — Wires along highways.

13. The fact that poles for electric wires of a membership corporation are strung along county and state highways, although not determinative of its public utility status, may be taken into consideration in connection with other facts, p. 168.

[January 5, 1942.]

ACTION *by membership corporation operating electric facilities in rural territory for a declaratory judgment to the effect that it is not subject to a tax imposed on public utilities; judgment in favor of plaintiff reversed.*

APPEARANCES: Ewing T. Kerr, Attorney General, Harold I. Bacheller, Deputy Attorney General, and Arthur Kline, Assistant Attorney General, for appellants; Walter Q. Phelan, of Cheyenne, and J. M. Roushar, of Torrington, for respondent; E. J. Goppert, of Cody, and George F. Guy of Cheyenne, amici curiae.

BLUME, J.: The legislature in 1937, by Chap. 102 of the Session Laws of that year, passed a general sales-tax law. It provided by subdivision (b) of § 4 of this act that there should be paid an excise tax of 2 per cent paid "to public utilities, gas, electric, heat corporations as defined by Chap. 94, Wyoming Revised Statutes, 1931, whether such corporations are municipally or privately owned, for gas, electricity, or heat, furnished for domestic, industrial or commercial consumption." The State Board of Equalization claimed that the plaintiff is subject to the tax just mentioned. The plaintiff denied that, claiming that it is not a public utility, but a private corporation. Thereupon the plaintiff brought this action, on behalf of itself and other rural electric companies, similarly situated, for a declaratory judgment to the effect that it and they are not subject to this tax. The action was brought against the foregoing board and the individual members thereof. An answer was filed to the petition, in which it is claimed that the plaintiff and others similarly situated are public utilities, and asking the court to declare it and them to be subject to the tax above mentioned. The trial court held with the plaintiff, and from the judgment thus entered, the board has appealed.

Plaintiff was organized in 1937 as an electrical corporation to furnish electricity to its members only. It was not organized for gain, and it has no capital stock. Membership is evidenced by a certificate of membership, issued to those who are elected members of the corporation by the board of directors. The membership fee is $5. Each member must agree to purchase electricity from the corporation, which must be paid for monthly according to the rate established from time to time by the board of directors, but whatever surplus may be accumulated is distributed among the members, so that the electricity will be furnished substantially at cost. The corporation borrowed money from the Rural Electrification Administration of the Federal government pursuant to an act of Congress, 7 USCA § 901 et seq., in order to build its plant and equipment. It operates in the southeastern portion of Laramie county, in which it has a membership of about 180. It also operates in the adjoining territory in the states of Nebraska and Colorado. It has solicited most of the farmers in the territory in which it operates to become members, but has denied membership to three applicants in Laramie county. It has also taken over five members who were formerly supplied with electricity from the electrical plant operated in Pine Bluffs, a town in Laramie county. Its income at the time of the trial was approximately $2,300 a month, which is continuing to increase. A few other facts will be mentioned in the course of the opinion.

The parties entered into a stipulation in regard to other corporations "similarly situated." From this it appears that the Wyrulec Association, a corporation like plaintiff, has from September, 1939, supplied the public schools of the towns of Huntley and of Veteran with electricity, whereas prior to that time they were supplied with electricity by a public utility. The Big Horn Rural Electric Company took over the plant and facilities of the Meeteetse Light Company, and

since about November, 1939, has been supplying electricity to the residents of the town of Meeteetse, who were formerly supplied by the Meeteetse Light Company, a public utility. About December, 1939, the Bridger Valley Electric Association, an association similar to the plaintiff, took over the plant and facilities of the Union Light and Power Company, a public utility, at the town of Lyman, in this state. The Lower Valley Power and Light Company, seemingly a corporation similar to plaintiff, has encroached upon the customers formerly supplied by the Star Valley Power and Light Company, a public utility.

As already stated, the plaintiff contends that it is not a public utility as defined by Chap. 94 of the Revised Statutes of 1931. Before turning to that law and examining it, we should, perhaps, mention that counsel for the respondents contend that we should apply the rule that a statute imposing taxes should be strictly construed. However, the state has adopted a general policy to tax the distribution of electricity. Most of the inhabitants of the state pay this tax. The quality of electricity consumed by the members of the respondent is not different from the quality of electricity on which the tax is paid. And no specific statute can be found which shows distinctly that the legislature intended to favor one class over another in this connection, so that it would seem that the claim here made is in the nature of an exemption, and that instead of applying the rule mentioned by counsel for the respondent, it would be more appropriate to apply the rule mentioned in 59 CJ 1135, to the effect that "in pursuance of the beneficent public policy which favors equality in the distribution of the burden of government, all exemptions of persons or property from taxation are to be construed strictly against the exemption; the intention to create exemptions must affirmatively appear and cannot be raised by implication." We shall not, however, in the decision of this case, lay any stress on that rule, but hope to find a satisfactory solution herein on broader grounds.

Section 94–101, Rev. Stats. 1931, defines what shall constitute a public utility. Under its terms a corporation is included within the meaning of the term "person." The section, in so far as applicable here, and in conjunction with subdivision (c) of the section, provides:

"The term 'public utility,' when used in this chapter, shall mean and include every person, or municipality, that owns, operates, leases, controls, or has power to operate, lease, or control:

. . . . . .

"(c) Any plant, property, or facility for the generation, transmission, distribution, sale, or furnishing to or for the public of electricity for light, heat, or power, including any conduits, ducts or other devices, materials, apparatus, or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat, or power;" etc.

This provision, with all superfluous and strengthening terms left out, reads that any corporation which operates "any plant, property, or facility for the . . . furnishing to or for the public of electricity" shall be considered a public utility. While the provision is not free from doubt, it bears the inter-

pretation put upon it by counsel for plaintiff, namely, that it means that a corporation is a utility only when it furnishes electricity to the public. Difficulty is encountered when we consider the reference to the power to operate, etc. That provision, with superfluous terms left out, states that a corporation which "has power to operate, lease or control . . . any plant, property, or facility for the . . . furnishing to or for the public of electricity" shall be considered a public utility. That is a sweeping and extremely broad provision, and seems to include any corporation which has merely the power to furnish electricity to the public, whether it actually does so or not, and clearly includes within its terms a corporation such as plaintiff. That meaning seems to be enforced by the latter part of subdivision (c) which apparently provides that under the head of public utility shall be included any apparatus or property "used or to be used for the transmission of electricity for light, heat or power." It may be conceded that the legislature lacks the power to make a provision as broad as the language here set out indicates, at least as to some persons and corporations (State ex rel. Danciger & Co. v. Public Service Commission [1918] 275 Mo 483, PUR1919A 353, 205 SW 36, 18 ALR 754; Allen v. Railroad Commission [1918] 179 Cal 68, PUR 1919A 398, 175 Pac 466, 8 ALR 249), and we have pointed out these provisions merely to show that the section gives no support to the contention of plaintiff herein, but would seem to indicate that this court should not give a narrow, but a liberal construction to the term "public utility."

Section 94–101, *supra,* makes certain exceptions and provides as follows: "None of the provisions of this chapter shall apply to interstate commerce; nor to farmers' mutual telephone associations having no capital stock and furnishing service to members of such associations only and without tolls, except as provided in § 94–145 hereof; nor to the generation, transmission or distribution of electricity, nor to the manufacture or distribution of gas, nor to the furnishing or distribution of water, nor to the production, delivery or furnishing of steam or any other substance, by a producer or other person, for the sole use of such producer or other person, or for the use of tenants of such producer or other person and not for sale to others."

[1, 2] The first exception relates to mutual telephone companies charging no tolls. The reference to § 94–145 makes the provision somewhat obscure. But we need not determine the exact meaning, and merely note that an exception was made. Counsel for the plaintiff argued that since mutual telephone companies were excluded from the legislative act, it is reasonable to conclude that it also intended to exclude mutual electrical companies. But the exact contrary might well be argued, namely, that since the legislature only excluded mutual telephone companies, it did not intend to exclude any other mutual companies, and that seems to be true in view of § 94–145 which we shall mention hereafter. Moreover, the legislature had in mind the furnishing of electricity in certain cases. It specifically provided that if a person produced electricity for his own use or that of his tenants, he should

not come within the provisions of the act. Reference is also made to "other persons." That evidently means that if a person buys electricity from a producer for his own use and that of his tenants—for instance, an owner of an apartment house, "dude ranch" or factory—such person (or corporation) should not come within the purview of the legislative act. In view of these specific exceptions we are at once confronted with the fact that "we cannot overlook the well-settled principle that when the legislature has made exceptions to a general rule it must be deemed to have incuded in its exceptions all that it intended to except." Rothschild v. Superior Court (1930) 109 Cal App 345, 293 Pac 106, 108. Many cases in support of this rule are cited in 59 CJ 1092, including Re Cadwell's Estate (1920) 26 Wyo 412, 186 Pac 499. By applying that rule in the case at bar, there is no escape from the conclusion that the legislature intended the plaintiff in this case to be included within the meaning of a "public utility." If any doubt were left on the subject, it would, we think, be dissipated by the provision of § 94–145, Rev. Stats. 1931, which provides in part: "No street railroad, gas, electrical, telephone, or water public utility operating for profit or *mutual benefit* shall henceforth begin the construction of a street railroad, or of line, plant or system . . . without having first obtained from the Commission, a certificate that the present or future public convenience and necessity require or will require such construction," etc.

This section clearly recognizes that a corporation which operates an electric plant for mutual benefit of its members, and not for profit, may be a public utility.

The constitutionality of the statute has not been assailed, so we shall not, directly in any event, consider that point. But, in view of the importance which rural electric companies now play, and are likely to play in the future, in the economic life of the state and nation, we might seem to be remiss in our consideration of the case if we rested our decision upon what has already been stated, without considering the case from a broad and fundamental standpoint, and without investigating whether, on the whole, the legislature may be said to have acted reasonably in declaring associations like plaintiff to be public utilities, as seemingly it has done, or whether, on the other hand, the construction of the statute which it seemingly bears is so unreasonable that it should be rejected.

We are cited to Inland Empire Rural Electrification v. Department of Public Service (1939) 199 Wash 527, 30 PUR(NS) 173, 92 P(2d) 258, and Garkane Power Co. v. Public Service Commission (1940) 98 Utah 466, 33 PUR(NS) 129, 100 P(2d) 571, 132 ALR 1490, in which a rural mutual electric company was held not to be subject to the control of the Public Service Commission of the state. But these cases are not controlling herein, for the reason that the statutes in these states are different from our own. The Washington statutes contain neither the exception mentioned in § 94-101, *supra,* nor the provision quoted from § 94–145, *supra.* Furthermore, the court in the Washington Case relied to some extent at least on the fact that the statutes in that state contained

detailed provisions as to the organization and powers and duties of mutual companies, without making any reference to public utilities. Our statutes, while providing for companies without capital stock, contain no such provisions as the Washington statutes. The Utah statutes contain no such provision as that cited from § 94–145, *supra*, and provide that "the term 'public utility' includes every common carrier, gas corporation, electric corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, and warehouseman where the service is performed for, or the commodity delivered to, the public generally." Rev. Stats. 1933, 76-2-1, subd. 28. Nor did the court discuss any exceptions such as contained in our § 94–101, *supra*.

Counsel for the plaintiff also cite us to State Board of Equalization v. Stanolind Oil & Gas Co. (1939) 54 Wyo 521, 94 P(2d) 147, 156, as decisive herein. In that case the company delivered to another company, an oil refining company, electricity for light and power; it made wholesale sales of electricity to two other companies, and "the rest of the electricity . . . was used solely by it in performance of its own contracts with lease owners and in the operation of its own plant and facilities; . . . [it] never owned or operated any plant for selling or furnishing to the public electricity." We indicated (aside from the stipulation in that case) that the company was not a public utility. The decision in that case is supported by many other cases which show facts similar to those in that case. Schumacher v. Railroad Commission (1924) 185 Wis 303, PUR1925C 228, 201 NW 241; Overlook Develop. Co. v. Public Service Commission (1932) 306 Pa 43, 158 Atl 869; Cawker v. Meyer (1911) 147 Wis 320, 133 NW 157, 37 LRA(NS) 510; Ford Hydro-Electric Co. v. Aurora (1932) 206 Wis 489, 240 NW 418; Colorado Utilities Corp. v. Public Utilities Commission (1936) 99 Colo 189, 17 PUR(NS) 187, 61 P(2d) 849; Nowata County Gas Co. v. Henry Oil Co. (1920) 269 Fed 742; State ex rel. Danciger & Co. v. Public Service Commission (1918) 275 Mo 483, PUR1919A 353, 205 SW 36, 18 ALR 754; State ex rel. Public Service Commission v. Spokane & I. E. R. Co. 89 Wash 599, PUR1916D 469, 154 Pac 1110, LRA 1918C 675; Junction Water Co. v. Riddle, 108 NJ Eq 523, PUR1932B 302, 155 Atl 887; Ambridge v. Public Service Commission, 108 Pa Super 298, PUR1933D 298, 165 Atl 47; Southern Ohio Power Co. v. Public Utilities Commission (1924) 110 Ohio St 246, 143 NE 700, 34 ALR 171; St. Louis v. Mississippi River Fuel Corp. (1938) 97 F(2d) 726; Stoehr v. Natatorium Co. 34 Idaho 217, PUR1922A 626, 200 Pac 132. These cases, while worthy of perusal in order to gain a comprehensive view of the subject before us, are not controlling, and we shall not take the time or space to analyze them. More closely in point are cases which deal with mutual or coöperative companies or associations.

In People ex rel. Knowlton v. Orange County Farmers' & Merchants' Asso. 56 Cal App 205, PUR 1922D 443, 204 Pac 873, the association was organized to establish a farmers,' fruit growers,' merchants' and

business men's improvement, information and publicity bureau and system for the benefit and mutual improvement of the members of the association, and to facilitate the exchange of information, advices and ideas, as to crops, weather, financial, and other matters among its members. No fees were to be paid except amounts sufficient to pay the expense of operation. The association constructed a telephone line, and received authority from the board of commissioners of the county to erect poles and wires along the roads of the county. The statute defined a telephone corporation as one which operated a telephone system for compensation. It was held that the association was not a public utility, and could not be required to apply for a certificate of necessity. The court approved the holding of the Public Utility Commission which had held that the association was not under its control. The court likened the association to a department store which constructs a telephone system to connect with its various departments.

In State v. Southern Elkhorn Teleph. Co. 106 Neb 342, PUR1921E 33, 183 NW 562, it appears that ten farmers constructed a rural telephone line, adopting the name of Southern Elkhorn Telephone Company, though not incorporated. Each of the farmers contributed his proper proportion of the expense of constructing the lines, keeping the lines in repair and paying the expense thereof by assessments against the individual members. The Nebraska Telephone Company at Norfolk furnished switching service for them and arranged to connect them with the Norfolk subscribers and with long-distance lines. The agreement among them in connection with constructing the lines did not provide for taking in any new members. One Doxstader wanted to connect with the lines but was refused permission to do so. The state brought an action to compel this permission. The court held that the association was not a public utility and was not compelled to give the permission to connect with its lines. The statute defined telephone and telegraph companies as those engaged in the transmission of messages for hire. A like conclusion under a similar statute was reached in State ex rel. Buffum Teleph. Co. v. Public Service Commission, 272 Mo 627, PUR1918C 158, 199 SW 962, LRA 1918C 820, in connection with a mutual telephone association consisting of a large number of members, who individually owned the lines and boxes on their own property, the association as such owning but a small amount of the lines connecting the various individuals.

In State P. U. C. ex rel. Macon County Teleph. Co. v. Bethany Mut. Teleph. Asso. (1915) 270 Ill 183, PUR1916A 997, 110 NE 334, Ann Cas 1917B 495, it was held that a telephone association, organized purely for the purpose of serving its members, is not subject to the control of the state Utilities Commission. The holding in that case was followed in State P. U. C. v. Okaw Valley Mut. Teleph. Asso. 282 Ill 336, PUR1918C 583, 118 NE 760, in which it appears that the association consisted of about forty persons. At least most of these cases are distinguishable. Some of them, especially those from Illinois, are rather sweeping in their scope, and may be said to be borderline cases.

We hardly think that that court meant to announce doctrines contrary to those announced in the cases hereafter mentioned. At least we do not think them controlling herein.

Counsel for plaintiff have misunderstood Alabama Power Co. v. Cullman County Electric Membership Corp. (1937) 234 Ala 396, 19 PUR(NS) 464, 174 So 866, and Carolina Power & Light Co. v. Johnston County Electric Membership Corp. (1937) 211 NC 717, 20 PUR(NS) 208, 192 SE 105. It was held in these cases that a rural electric company does not need a certificate of necessity from the Public Service Commission. But that holding was based on specific provisions of a statute. The latter case does not determine whether the rural electric company is or is not a public utility, while in the former of these cases, it is expressly recognized that it is. Section 18 of Chap. 442 of the Session Laws of Virginia of 1936 provides that such rural electric company is subject to the Public Utility Commission "in the same manner and to the same extent as are other similar utilities under the laws of the state of Virginia." By § 18, Chap. 175, Laws of 1935, the Indiana Public Service Commission was given the same power to fix rates of a rural electric company in the same manner as of other public utilities. In Maine, too, such corporation was by Chap. 230, Laws of 1931, put under the control of the Public Utility Commission of that state. While it may, perhaps, be argued that in view of the special provisions subjecting rural electric companies to the control of the Public Service Commission, indicates that in the absence of such special provision, it would not be deemed to be thus subject, the legislation also indicates that the legislatures of these states deemed it proper that such companies should be considered public utilities. Chapter 115, Laws of North Dakota of 1937; Chap. 100, Laws of New Mexico of 1937; Chap. 172, Laws of Montana of 1939; No. 389 (page 1969) of the laws of Pennsylvania of 1937, 14 PS Pa § 251 et seq.; Chap. 46, Laws of Oklahoma of 1939, 18 Okla St Ann §§ 437, 437.1 et seq.; directly or indirectly provide that rural electric companies shall not be subjected to the control of the Public Service Commission of the state. While these legislatures thought that such companies *ought not* to be thus subjected, they evidently also thought that in the absence of such special provision they would have, or at least might have, come under such control—in other words, would or might have been held to be public utilities. Thus we find numerous legislatures occupied with the thought that such companies were or at least might not inappropriately be considered, as public utilities.

The Public Service Commissions (using that term herein indiscriminately for a Commission which in the respective states has power over public utilities) which have passed on the question before us have not been unanimous in their holdings. The Commission in Oklahoma held a rural electric company, such as the plaintiff herein, not to be a public utility under the Oklahoma statutes which, as may be seen from the opinion, are different from ours. Southwestern States Teleph. Co. v. Oklahoma Inter-County Electric Cooperative (1938) 27 PUR(NS) 321. The Public Service

Commission of New Jersey during this year has held the contrary under a statute which defines a public utility as one which renders service to the public. The Public Service Commission of West Virginia, too, held likewise in 1938. Re Harrison Rural Electrification Asso. (1938) 24 PUR(NS) 7. It called attention to the fact that rural electric companies receive public loans, indicating that the benefit thereof should not be confined to a limited number. The supreme court of Utah in Garkane Power Co. v. Public Service Commission, *supra,* answered this argument by saying that if such contention were true "we must also class as public utilities, bound to serve the public, all the many hundreds or thousands of business organizations which have borrowed from the Federal government through R. F. C., P. C. C., etc." [98 Utah 466, 33 PUR (NS) at p. 134.] The thrust would have been well directed, except for the fact, overlooked by the court, and not mentioned by the Public Service Commission of West Virginia, that the act providing for loans to rural electric companies, 7 USCA § 904, provides that "no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the state authority having jurisdiction in the premises is first obtained." Loans to private corporations are not, at least generally, supervised by any state authority, so that Congress probably had in mind that such companies would or should be considered public and not private corporations.

[3] We find, accordingly, that service commissions, as well as legislatures, have not perceived anything extraordinary in the fact that associations like plaintiff should be deemed to have devoted their property to public use, and while that is not, of course, controlling on courts, such widespread public opinion would at least cause us to hesitate to announce a contrary rule under statutes such as we have, and in holding the provisions thereof to be so unreasonable as to require us to ignore them. And considering the subject as a whole, and examining the authorities bearing thereon, we find ample support for the position taken by our legislature.

[4–7] In order that an owner of an electric plant may be said to be a public utility, his or its property must be devoted to public use. Stoehr v. Natatorium Co. 34 Idaho 217, PUR 1922A 626, 200 Pac 132; Story v. Richardson (1921) 186 Cal 162, 198 Pac 1057, 18 ALR 750; 51 CJ 5. And it has been held that such dedication will not be presumed without evidence of unequivocal intention. Stoehr v. Natatorium Co. *supra;* Southern Ohio Power Co. v. Public Utilities Commission (1924) 110 Ohio St 246, 143 NE 700, 34 ALR 171; Allen v. Railroad Commission, 179 Cal 68, PUR1919A 398, 175 Pac 466, 8 ALR 249. Still that intention may be shown by the circumstances in a case. The facts govern. It does not, as will appear later, solely depend upon the wishes and the declarations of the owner. This much, doubtless, is true, that an owner of such a plant must at least have undertaken to actually engage in business and supply at least some of his commodity to some of the public. That has been done in this case. Supplying electricity has long been, and now is universally recognized as a service in which the public may

be interested, and which, accordingly, may be impressed with a public character, in the absence of countervailing reasons. Wyman on Public Service Corporations, § 243. It has been held that the "mere purchase, transmission, and sale of electric energy, a commercial product, without more, contains no implication of public service." State ex rel. Buchanan County Power Transmission Co. v. Baker, 320 Mo 1146, PUR1929A 106, 113, 9 SW(2d) 589, 592; Southern Ohio Power Co. v. Public Utilities Commission, *supra*. That may be conceded, still it would seem that the character of service may be taken into consideration when additional facts exist. The sale and furnishing of lumber, for instance, stands on a different footing from the sale and furnishing of electricity under certain conditions. We may infer a public service in the one case when we would not in the other. See 51 CJ 5. It has been held that the number of customers is not a criterion. Dairymen's Co-op. Sales Asso. v. Public Service Commission (1935) 318 Pa 381, 177 Atl 770, 98 ALR 218. Still we are led to suspect that limited service has had much to do with decisions in certain cases. It seems to be one of the natural criteria in determining the question whether or not we are dealing with a public utility, if we are dealing with the service of a commodity in which the public has generally been held to have an interest. And that was directly stated in Pennsylvania Chautauqua v. Public Service Commission, 105 Pa Super Ct 160, PUR1932D 145, 148, 160 Atl 225, 227, where the court stated: "In our view, the character and extent of the water service rendered make it public." Similar in effect are Industrial Gas Co. v. Public Utilities Commission (1939) 135 Ohio St 408, 29 PUR(NS) 89, 21 NE(2d) 166; Clarksburg Light & Heat Co. v. Public Service Commission, 84 W Va 638, PUR1920A 639, 100 SE 551; Davis v. People ex rel. Public Utilities Commission, 79 Colo 642, PUR1926E 635, 247 Pac 801. These cases will presently be specially considered. See also 89 U. of Pa L. R. 1108. It has been said: "A true criterion by which to judge of the character of the use of any plant or system alleged to be a public utility is whether or not the public may enjoy it of right or by permission only." Junction Water Co. v. Riddle, 108 NJ Eq 523, 526, PUR1932B 302, 155 Atl 887, 889; Farmers' Market Co. v. Philadelphia & R. T. R. Co. (1891) 142 Pa 580, 21 Atl 902, 989. While that feature frequently comes into prominence, it is, perhaps, not quite correct to call it a "criterion." It is, rather, ordinarily, an incidence, a necessary result, an essential feature, of the dedication to public use. To state that property has been devoted to public use is to state also that the public generally, in so far as it is feasible, has the right to enjoy service therefrom. It may be as difficult to determine the one fact as the other. In such case we cannot determine the right to demand such service by the fact that the plant is a public utility, and the fact that it is a public utility by the fact that the right to demand the service exists. That would be simply reasoning in a circle. The fact of dedication to the public, as well as the right to demand service on the part of the public generally, may be shown by explicit profession, or indirectly by indiscriminate service or so-

licitation, by the exercise of the right of eminent domain, by the voluntary submission to regulation and by perhaps other facts, although some of these facts may not be controlling. See 51 CJ pp. 5, 6. When the existence of a public utility is denied or contested, that phase of the question which relates to the right of the general public to demand service is ordinarily, or at least frequently, in the forefront, by reason of the fact that we generally meet with contracts entered into by the owner with consumers, or with provisions made for limited membership, as in the case at bar. So the question in such cases naturally is as to whether or not notwithstanding that, any one else has an equal right to the services of the owner. The facts in the case may be such, as in the cases already cited, that a court hesitates to hold that the owner should be held to be a public utility. And counsel for plaintiff have emphasized the contractual limitation. They rely upon 51 CJ 5, which states that the test as to whether an owner is a public utility or not is "whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public as a class or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals." See also 13 CJS Carriers, § 3, pp. 26–28; 9 Am Jur 431. Of course, if the service is rendered pursuant to contract or limited membership, it is difficult to hold that one has expressly held himself out as ready to serve the public generally. But the text does not require an express holding out. It may be done impliedly, as by wide solicitation and other factors. Keystone Warehousing Co. v. Public Service Commission (1932) 105 Pa Super Ct 267, 161 Atl 891; Bingaman v. Public Service Commission (1932) 105 Pa Super Ct 272, 161 Atl 892; Erb v. Public Service Commission (1928) 93 Pa Super Ct 421. This counsel have overlooked. If by entering into contracts, or limiting service to members, the owner may in all cases escape the burdens attending a public utility, the plaintiff herein cannot be said to be such utility. If that is true, then, of course, plaintiff, though it should absorb all other like organizations in the state, and obtain a large membership in all rural sections therein, could not even then be called a public utility, and we are unable to see how it would make any difference if it should make most of the consumers of electricity in our towns and cities its members. The authorities do not, we think, call for any such result.

In United States v. Ohio Oil Co. (1914) 234 US 548, 561, 58 L ed 1459, 34 S Ct 956, 958, the owner of a pipe line carried everybody's oil, who offered it, but only when offered for sale to the owner of the pipe line. In other words, the oil owned by the public was carried by the owner of the pipe line under what may be designated a contract. It was held to be a common carrier, the court holding that Congress has power to "require those who are common carriers in substance to become so in form."

In Davis v. People ex rel. Public Utilities Commission, 79 Colo 642, PUR1926E 635, 637, 247 Pac 801, 802, it appears that Davis hauled freight by truck for over 90 per cent of shippers in his territory. He had

organized most of the shippers into an association, which, however, was in fact a sham organization. Davis hauled goods under a contract with this organization. He was held to be a common carrier, the court stating in part: "In determining whether a business is that of a common carrier, 'the important thing is what it does, not what its charter says.' Terminal Taxicab Co. v. Kutz, 241 US 252, 60 L ed 984, PUR1916D 972, 36 S Ct 583, Ann Cas 1916D 765. A service may effect 'so considerable a fraction of the public that it is public in the same sense in which any other may be called so. . . . The public does not mean everybody all the time.' Id. Had defendant made all save one of the shippers of freight in that territory, or all purchasers of postage at any post office therein, members of the association, and claimed that such limitation converted an otherwise public into a private carrier, the contention would be so absurd as to be instantly rejected. But the reasons for that rejection would be the identical reasons which demand rejection of defendant's contention, in the instant case: (a) The proportion of the public served is so large as to be the public; (b) the limitation is a mere device to hoodwink the law."

In Terminal Taxicab Co. v. Kutz, 241 US 252, 60 L ed 984, PUR1916D 972, 36 S Ct 583, Ann Cas 1916D 765, a taxicab company, forbidden by its charter to engage in public service, hauled, under contract with a railway station company and some hotels, persons going from and to the station and guests from and to the hotels, the contract giving the taxicab company the exclusive right to solicit the public at these places for the purpose of transportation. The company was held to be a common carrier.

In Dairymen's Co-op. Sales Asso. v. Public Service Commission (1935) 318 Pa 381, 177 Atl 770, 773, 98 ALR 218, already cited, the court, while holding that the carrier involved in that case was not a common carrier, stated: "The status of one as a common carrier is not changed by an occasional refusal to perform services for which he is equipped or by the fact that he does not advertise, and the fact that one makes written contracts with his patrons is not controlling in determining that question. Erb v. Public Service Commission (1928) 93 Pa Super Ct. 421; Bingaman v. Public Service Commission (1928) 105 Pa Super Ct 272, 161 Atl 892. 'What constitutes a common carrier is a question of law but whether one charged with being a common carrier has by his method of operation brought himself within that definition is a question of fact to be determined from the evidence in each case as it arises.' . . . Mere schemes or devices to avoid the duties and responsibilities of a common carrier are impotent for the purpose intended when the true character of such acts is established." In Erb v. Public Service Commission, *supra,* Bingaman v. Public Service Commission, *supra,* and Keystone Warehousing Co. v. Public Service Commission (1932) 105 Pa Super Ct 267, 161 Atl 891, the court took into consideration the fact that the services performed by the carrier were not incidental to any other business, but constituted his sole business. Entering into private contracts was held not to be controlling. And the court in

Goldsworthy v. Public Service Commission (1922) 141 Md 674, PUR 1923C 626, 119 Atl 693, pointed out that if entering into contracts with customers would control the determination whether an owner is a public utility or not, that would be an easy way of evading the law. In Cushing v. White (1918) 101 Wash 172, 172 Pac 229, 232, LRA1918F 463, the court stated that whether an owner is a public utility or not "must be determined by the character of the business actually carried on . . . and not by any secret intention or mental reservation it may entertain or assert when charged with the duties and obligations which the law imposes." See also 9 Am Jur 437; note, 18 ALR 1320, 1321. While some of the authorities here cited deal with common carriers, the rules there announced are equally applicable in a case like that at bar. In Pennsylvania Chautauqua v. Public Service Commission, 105 Pa Super Ct 160, PUR1932D 145, 148, 160 Atl 225, the plaintiff, incorporated as a mutual company for only educational purposes, acquired about 30 acres of land, which was divided into lots and sold to stockholders, and water was furnished them under contract which contained certain covenants. But some of the water was also furnished to nonstockholders, and there were in all about 152 consumers. It was held that the plaintiff was a public utility, the court stating, as already shown, that "in our view, the character and extent of the water service rendered make it public." In Valcour v. Morrisville (1938) 110 Vt 93, 27 PUR(NS) 34, 39, 2 A(2d) 312, 315, it was held that as long as a village furnishing electricity to a rural community "serves and monopolizes this territory it should not be permitted to discriminate between those desiring such service." In Consolidation Coal Co. v. Martin (1940) 113 F(2d) 813, 817, the court stated: "*Acceptance of substantially all requests* for service [of electricity] constituted an election to engage in such business. The company has in practical effect devoted its property in part to a public function." (Italics are ours.) In Wingrove v. Public Service Commission (1914) 74 W Va 190, 81 SE 734, 735, LRA1918A 210, a company owning an electric light plant, which was primarily erected for its own use, undertook, nevertheless, though not authorized by its charter, to furnish light to the people of the community, freely doing so, upon application, except in three instances. It was held: "Acceptance of practically all applications for service, made by citizens of the town, is a sufficient election to engage in the business and manifestation thereof, without advertisement of the fact or solicitation of customers."

The same court in Clarksburg Light & Heat Co. v. Public Service Commission (1919) 84 W Va 638, PUR 1920A 639, 646, 100 SE 551, 554, stated in part as follows: "The fact that the conduct of any particular enterprise may have in the remote or even recent past been considered as entirely the subject of private contract, while persuasive of the private character of the business, is not at all conclusive. Of course it is very well recognized that in order to make any particular business subject to the police power it must be affected with a public interest. Not only must the service offered be available to anyone who applies for

it, but anyone who desires it must have the right to demand it upon complying with proper regulations, and the payment of proper charges therefor. It must be such a business as the public authorities have a right to subject to the regulatory power of the state for the benefit of its inhabitants, and the question in this case is: Is the petitioner's business such a one? When does any particular enterprise or line of business fall within the regulatory power of public authority? From what we have said it is apparent that no rule can be laid down which can be followed blindly or arbitrarily over any period of time. The ever-changing conditions of modern business, and the constantly varying relations of the public to such business, make necessary the extension of this power in the interest of the public to such businesses as may by their conduct decidedly influence for weal or for woe the general welfare of the community. And it may be said that whenever the relation of any business or enterprise to the public, or to any substantial part of a community, becomes so close as to make the welfare of the public, or any substantial part of it, depend upon the proper conduct of such business, then it becomes a subject upon which the regulatory power of the state may be exercised for the benefit of the whole, and the determination by the legislature that a particular business belongs to such class will not be set aside where there is a substantial foundation for it."

This case was cited and relied upon to a considerable extent in State ex rel. Bricker v. Industrial Gas Co. (1937) 58 Ohio App 101, 110, 113, 16 NE (2d) 218, 222, which, though in many respects different from the case at bar, has some features which are similar. The Industrial Gas Company never furnished gas to the public indiscriminately, but under contracts, and the main question arising in the case was as to whether or not indiscriminate service was essential, in order to make it a public utility. The court conceded that if this was essential, it could not be so classified. The court, however, held: "We do not conceive the test to be so narrow. . . . If 'public use' be given the restricted meaning contended for by defendant company, it is conceivable that utilities could serve great numbers of consumers of their product directly, if confined to a class, and escape any obligation as a public utility and prevent any regulation by the state."

Industrial Gas Co. v. Public Utilities Commission (1939) 135 Ohio St 408, 29 PUR(NS) 89, 92, 93, 21 NE(2d) 166, 168, involved every vital question involved in the case at bar. It appears therein that plaintiff company was operating about 50 miles of pipe lines, was serving nineteen industrial consumers and twelve private consumers, all under written contract which stipulated the price to be paid for gas; the plaintiff company never held itself out as ready to serve the public generally, and had refused to serve certain applicants. The company made an application to be permitted to withdraw from the field of serving private consumers, and amended its certificate of incorporation to that end. It contended that it was not a public utility. The court, holding that it was, stated in part as follows: "It is what the corporation is doing rather than the purpose clause that determines whether the

business has the element of public utility. . . . The appellant with its 50 miles of pipe lines running through four counties supplying nineteen industrial plants with natural gas was rendering a service to a substantial part of the state that would ordinarily be serviced by public utilities under regulatory restrictions. It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilities until the whole state would be honeycombed with them and public regulation would become a sham and delusion. What appellant seeks to do is to pick out certain industrial consumers in select territory and serve them under special contracts to the exclusion of all others except such private or domestic consumers as may suit its convenience and advantage. There were other industrial consumers with whom the appellant refused or failed to agree and so did not serve them. If such consumers were served at all, it must necessarily be by a competitor. If a business so carried on may escape public regulation then there would seem to be no valid reason why appellant may not extend the service to double, triple or many times the number now served without being amenable to regulative measures. . . . It is not a controlling factor that the corporation supplying service does not hold itself out to serve the public generally. It has been held that a business may be so far affected with a public interest that it is subject to regulation as to rates and charges even though the public does not have the right to demand and receive service. . . . Regardless of the right of the public to demand and receive service in a particular instance, the question whether a business enterprise constitutes a public utility is determined by the nature of its operations. Each case must stand upon the facts peculiar to it. A corporation that serves such a substantial part of the public as to make its rates, charges, and methods of operations a matter of public concern, welfare, and interest subjects itself to regulation by the duly constituted governmental authority. . . . Nor should the curtailment of its incidental corporate functions made with the purpose of avoiding public regulatory processes be determinative of the true character of its business. Thus, changing the purpose clause of its charter, refraining from use of the right of eminent domain, avoiding a holding out to serve the public generally and selling only to select consumers by private contract could be employed as subterfuges by many public utility companies. If the business is still affected with a public interest, it remains a public utility. It is the conclusion of this court that appellant dedicated itself to public utility service in behalf of a substantial part of the public and within a substantial area so as to make its business a matter of public concern, welfare, and interest; consequently it is a public utility and subject to regulation by the Public Utilities Commission."

[8–13] These cases, we think,

clearly establish the law to be that merely because an owner enters into contracts in connection with his service, and in some instances refuses service, is not a controlling factor. If that is correct that must be true also in connection with an owner with limited membership, as in the case at bar, since such limited membership is but another form of an attempted limitation by contract. And turning to the facts in the case at bar, all the prominent factors, announced by the foregoing authorities as indicative of a public utility, are present: (1) Plaintiff deals in a commodity in which the public as a whole is generally interested. (2) It is actually engaged in business and is supplying its commodity to some of the public. (3) It serves a substantial portion of the public, within the meaning of the cases cited. It operates in the southeastern portion of Laramie county in this state and in the adjacent territory in Nebraska and Colorado. It has a membership in 180 in Laramie county. Counting 4 members to a family, it serves a population of probably approximately 700 people in that county. And if we may assume that it serves an equal population in Nebraska and Colorado, it probably serves a population of approximately 2,000 people. (4) While the evidence is not as clear as could be wished, the circumstances indicate that it has a monopoly in the rural portion of the territory in which it operates, which is a factor to be taken into consideration, as held in Valcour v. Morrisville, *supra*. (5) It solicited practically everyone in that territory, and has rejected but three applications in Laramie county, so that it may well be said, within the meaning of the cases heretofore cited, that it has accepted substantially all requests for service of its commodity. (6) It is in direct contact with at least the municipal electric light plant at the town of Pine Bluffs which supplies electricity to the people of that town. It has it in its power, if it can furnish electricity sufficiently cheaply, to destroy that plant. Contact with a public utility and ability to compete with it ought not to be ignored, in determining the question before us. Industrial Gas Co. v. Public Utilities Commission, *supra*, and see Ashley Tri-County Mut. Teleph. Co. v. New Ashley Teleph. Co. (1915) 92 Ohio St 336, PUR1916B 401, 110 NE 959; see also 89 U. of Pa. L.R. 1107, 1108. Counsel for plaintiff argue that we should not declare plaintiff to be a public utility, until greater competition and a more extensive invasion of another's field has been shown. But we recall the ancient adage that "an ounce of prevention is better than a pound of cure." Some competition and some invasion on the part of plaintiff has already been shown, since it now serves five customers which were formerly served by the public utility at Pine Bluffs, and two of the parties in whose behalf this action is brought, as being situated similarly as plaintiff, have already bodily taken over the plant and facilities of corporations which admittedly are or were public utilities. Other signs, indicative of a public utility, are not wanting. (7) The plaintiff has the power of eminent domain under the laws of this state. Section 38–401, Rev Stats 1931. And while that is not determinative of its status as a public utility, it is a factor which may be taken into consideration. State

ex rel. Buchanan County Transmission Co. v. Baker (1928) 320 Mo 1146, 1151, PUR1929A 106, 9 SW (2d) 589. It has not, so far as the record shows, exercised that power. (8) But its poles for electric wires are strung along county and state highways. And while that fact, too, cannot be considered as determinative of its status (State P. U. C. ex rel. Macon County Teleph. Co. v. Bethany Mut. Teleph. Asso. [1915] 270 Ill 183, PUR1916A 997, 110 NE 334, Ann Cas 1917B 495), nevertheless, as pointed out by the Public Utility Commission of New Jersey (38 PUR (NS) 48, 53) it "involves the acquirement of special privileges in these highways and places. There is a public interest in the grant and acquirement of such public privileges," and may, therefore, be taken into consideration, in connection with other facts. Moreover, it is clear that the plaintiff, if necessary, will exercise the right of eminent domain, for it is given power in its certificate of incorporation to "do and perform . . . any and all things, and to have and exercise any and all powers as may be necessary or convenient to accomplish" any and all of its purposes. (9) Furthermore, § 7 of its bylaws provides that the board of directors shall cause to be established a complete accounting system, which, "among other things, *subject to applicable laws and rules and regulations of any regulatory body*, shall conform to the system designated by the Rural Electrification Administration." The only law to which such accounting system could be subject would be that provided on behalf of the Public Service Commission of this state in § 94–144, Rev. Stats. 1931. So that it would seem that the plaintiff itself has recognized the fact that it is subject to that Commission.

We think we must hold, under our statutes and under the authorities heretofore cited, that the plaintiff is a public utility, and that is true with associations similarly situated. The judgment of the trial court is accordingly reversed with directions to enter judgment in favor of the defendants as prayed in the answer.

Reversed, with directions.

Riner, C.J., and Kimball, J., concur.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Publications, Incorporated

v.

Bell Telephone Company of Pennsylvania

[Complaint Docket No. 13386.]

Service, § 134 — Grounds for denial — Telephones used to aid gambling.

A telephone company is justified in refusing to continue telephone and tele-

typewriter service to a subscriber publishing a "scratch sheet" almost exclusively composed of informative matters relating to horse racing and containing a reference to free phone service of the publisher, which phone service, over a large number of centralized lines, gives to purchasers of the sheet further horse-racing information habitually used by bookmakers in the illegal business of bookmaking.

(MORGAL, Commissioner, dissents; THORNE, Commissioner, dissents in separate opinion.)

[January 12, 1942. Rehearing denied January 26, 1942.]

COMPLAINT *against telephone company alleging proposed discontinuance of telephone and teletypewriter service; dismissed.*

By the COMMISSION: On or about July 24, 1940, Pennsylvania Publications, Inc. filed a complaint against the Bell Telephone Company of Pennsylvania, alleging in substance that respondent proposed to discontinue telephone and teletypewriter service to complainant in violation of the provisions of the Public Utility Law. Complainant specifically charged, inter alia, that on July 12, 1940, it received written notification from respondent that its telephone and teletypewriter service would be discontinued on July 22, 1940. The proposed discontinuance was based upon the fact that complainant was engaged in the publication of a "scratch sheet" and that the Commission in its order issued July 8, 1940, in the case of Plotnick v. Bell Teleph. Co. C. 13346, 35 PUR(NS) 87, had held that denial of service to subscribers engaged in such business was proper. Answer was duly filed by respondent, admitting the proposed discontinuance of service to complainant for the reasons stated, and for the further reason "that it feared that if it did not discontinue its service to complainant, it would be charged with aiding and abetting the commission of the crimes of bookmaking and pool-selling and other offenses contrary to the laws of Pennsylvania and of the United States."

Subsequent to the receipt of notice of the proposed discontinuance of service, complainant applied to the court of common pleas No. 1, Philadelphia county, to enjoin respondent from taking that action until such time as the Commission could pass upon the issues involved. An injunction to that effect was granted on July 31, 1940, and on the same day we ordered respondent to continue to render telephone and teletypewriter service to complainant until final disposition of the instant complaint.

Hearings were originally scheduled for September 11, 12, and 13, 1940, but at the request of counsel for complainant were continued until after disposition by the superior court of an appeal taken in the Plotnick Case above referred to. After the Commission's decision had been affirmed in Plotnick v. Public Utility Commission (1941) 143 Pa Super Ct 550, 39 PUR(NS) 423, 18A(2d) 542, hearings on the instant complaint were duly held and a voluminous record consisting of almost 800 pages of testimony and numerous exhibits has been

completed. Based upon this record the following are found to be the facts:

The offices of the Pennsylvania Publications, Inc. are located at 34 South 17th street, Philadelphia, and there are installed on these premises 40 individual telephone trunk lines proceeding from respondent's central exchange, each of which terminate at each of five "order turrets" mounted on tables. At each "order turret" seating space is provided for four telephone operators. By means of telephone equipment and switching facilities associated with the "order turrets," each operator can plug into any of the 40 lines and answer calls terminating thereon, and it is thereby possible for twenty operators to conduct conversations simultaneously over any 20 of the 40 lines. The telephones have a main directory listing in the name of "Pennsylvania Publications, Inc." They carry designations of the Locust exchange and their numbers are in three groups, namely, Locust 3240 to 3259, inclusive; Locust 3266 to 3271, inclusive, and Locust 3276 to 3289, inclusive. Each of these groups is so arranged that if the first number of any group is called and is busy, trunk hunting equipment in respondent's central office will automatically select an idle trunk line in that particular group for the completion of the call. A call, originating on a line in one group, cannot be completed on a line in either of the other two groups.

In addition to the 40 lines and 5 "order turrets" above described, complainant has an individual message rate business line with a handset which has a main directory listing in the name of "The William Armstrong Publishing Company, Inc." and an additional listing under the name of "Pennsylvania Publications." This line carries a Rittenhouse designation and its number is 9863. There are also on the premises two teletypewriters which are connected with respondent's general teletypewriter exchange service.

Complainant, a Pennsylvania corporation owned and controlled by members of the family of William Armstrong, is engaged in publishing and distributing a pamphlet commonly called a "scratch sheet" bearing the caption, "William Armstrong—Jockeys, Scratches, Daily Sports." This pamphlet consists of a single sheet of paper 11 inches long by 17 inches wide, which is folded vertically down the middle so as to make four pages, the caption appearing on the first page. It is issued twice daily, the first edition appearing about 10:30 A. M., and the second about 11:30 A. M. The content of the sheet is almost exclusively composed of informative matters relating to horse racing. There can be found therein the names of the tracks throughout the country where races are to be run that day, track and weather conditions, post times, the name of each horse entered in each race, its post position, the position in which it finished the last time it ran, the names of the horses which have been scratched, the stable entries, the name and weight of each jockey, the probable odds on each horse, the daily double, late results, and prices paid by mutual machines. The horses are arranged and numbered in the order in which complainant believes they should finish.

In addition to this data the publica-

tion also contains selections of probable winners for each race made by complainant's handicappers and others, captioned, "Keen Observers' Selections," "William Armstrong's Consensus of Opinion of Best Selections," "Leading Handicappers' Selections at Aqueduct," "Leading Handicappers' Selections at Suffolk Downs," etc. Other selections of probable winners for some, but not all, of the races to be run that day also appear and are headed, "William Armstrong's Best," "Last Minute Special," and "Telephone Special." In order to obtain all of this material, complainant employs the services of persons stationed at the race tracks throughout the country, and the services of persons reputed to be experts in the matter of handicapping horses. Complainant also avails itself of the use of an extensive library containing elaborate statistical records relative to racing, which is maintained by an affiliate in New York city. In the upper left-hand corner of the inner page of the Armstrong Sheet, complainant's telephone numbers in Philadelphia and Wilmington appear under the caption, "Armstrong's Free Phone Service." The negligible portion of the sheet not relating to horse-racing matters is devoted to observations on other sports or items of news or general information.

The pages of complainant's publication, which are the outside ones when the sheet is folded, are printed in New York city, and the type for the inside pages is set up in New York. All this material is then shipped to complainant's offices in Philadelphia, and the sheet is there put in final form for distribution and sale.

The average daily sale of plaintiff's "scratch sheet" is approximately 1,500 copies. It is sold only at newsstands, and the price is 25 cents per copy, of which 18 cents is returned to complainant by the newsdealer.

The "Free Phone Service" offered by complainant in its publication is provided in Pennsylvania in the following manner: Any purchaser of an Armstrong sheet may call the Philadelphia telephone numbers listed on the upper left-hand corner of the inner page of the sheet, and secure results of races already run and other racing information. It is for the purpose of disseminating such information that the teletypewriters and the 40 lines and 5 "order turrets" connected therewith are maintained by complainant. Information as to race results is received by teletypewriters and is given to anyone who requests it. In furnishing the results of any race the number listed at the left of the horse's name on complainant's sheet is given but the name of the horse itself is never mentioned. For example, if a person calls desiring information as to the horses which finished first, second, and third in the first race at Aqueduct, he might be told by complainant's telephone operator that they were "one, five, and three." Unless an Armstrong sheet, published that day, is consulted, the information given by complainant's telephone operator would not disclose to the person making the call the names of winning horses.

Respondent does not keep a day-to-day record of complainant's incoming calls but tests of the 20 lines of the Locust 3240 group made on July 10 and 11, 1941, disclosed that on these

two days there were 1,718 and 2,095 occasions, respectively, when incoming calls could not be completed as all 20 lines were busy. On numerous other occasions difficulty was experienced in securing an open wire in this group to complainant's offices. The 20 lines constituting the other two groups were not found to be similarly busy. Complainant makes no specific charge for furnishing this telephone service but provides it as an additional means of promoting the sale of its publication.

While the exact use made of each Armstrong sheet that is sold cannot be ascertained, the sheet is employed extensively by horse race bookmakers, i. e., those who receive bets on horses, in Philadelphia in the conduct of their businesses. From the uncontradicted testimony of Captain Craig Ellis, head of the vice squad of the Philadelphia police, it appeared that for the past ten years bookmakers have used Armstrong sheets, and that in the past several years practically every one of the numerous raids conducted by the Philadelphia vice squad on bookmakers and bookmaking establishments has revealed the use of complainant's publication. It is the practice of small bookmakers operating on the street or in cigar stores, taprooms, and newsstands, to mark down their bets on Armstrong sheets and then use the Armstrong numbers appearing to the left of the name of the horse when he phones in those bets to his headquarters. Some "bookies" are able to obviate the necessity of marking the sheets by memorizing the Armstrong numbers which they subsequently phone in. Large bookmaking establishments quartered in private offices have adopted the system of receiving bets on horses designated in terms of Armstrong numbers and marking them down on Armstrong scratch sheets together with results and prices paid. Payoffs by both large and small bookmakers are habitually made upon the basis of information received over the telephone from complainant's offices. Both marked and unmarked Armstrong sheets have been confiscated on numerous occasions by the Philadelphia vice squad from persons and establishments suspected of bookmaking. The use of Armstrong numbers to record bets renders it more difficult for the police to apprehend bookmakers than if the horse's name is recorded on a betting slip.

It appears that the bookmaker's practice of using Armstrong sheets has been developed largely since the use of leased wires for gambling purposes has been prohibited by state and Federal legislation. When such facilities were available it was customary for the bookmakers to post the information secured thereover and the number of their bets upon large sheets known as "run-down sheets." With the disappearance of the leased wires, the use of the "run–down sheets" has given way to the use of complainant's publication, and the information formerly supplied by the leased wire is now obtained from complainant. If complainant's publication and telephone service were not available it would be necessary for bookmakers to establish new systems of operating their businesses at considerable expense of time and money.

Upon the basis of the foregoing facts we find and determine that complainant's publication is adaptable for

use, and is intended for use in the illegal business of bookmaking, and that it is in fact employed by bookmakers to aid and assist them in the conduct of their operations. We further find and determine that the telephone and teletypewriter service which complainant desires here from respondent would be used in the encouragement and furtherance of the bookmaking business, and we consequently conclude that it would be improper for us to compel respondent to render such service.

The instant case is on all fours with Plotnick v. Public Utility Commission (1941) 143 Pa Super Ct. 550, 39 PUR(NS) 423, 18A(2d) 542, and the decision in that case controls here. In the Plotnick Case complainant proposed to enter into the business of publishing and distributing a "scratch sheet," and requested the Bell Telephone Company of Pennsylvania to install two telephones on his premises and render service thereover. This request was refused, and thereafter a complaint was filed with the Commission.

The evidence adduced at the hearing upon that complaint disclosed that complainant proposed to publish a sheet which would give information relative to horse racing throughout the country. The character of the proposed sheet was illustrated by numerous Armstrong "scratch sheets" introduced into the record as exhibits. The proposed sheet was to be supplemented by free telephone service which was to be substantially the same as the free telephone service described in the instant case. The head of the vice squad of the Philadelphia police, then acting Captain John T. Murphy, testified that "scratch sheets," including Armstrong sheets, were being used by bookmakers in Philadelphia as an integral part of their business, and that the use of scratch sheets rendered it difficult to apprehend those engaged in bookmaking. Upon this evidence of record the Commission made, inter alia, the following findings:

. . . . . .

"The Pennsylvania legislature in 1939 enacted the 'Penal Code' of 1939 and provided for the offense of pool-selling and bookmaking. Section 607 of that act, 18 Purdon Statutes § 4607 provides:

" 'Whoever engages in pool-selling, or bookmaking, or occupies any place with books, apparatus, or paraphernalia for the purpose of recording or registering bets or wagers, or of selling pools, or records or registers bets or wages, or sells pools upon the result of any political nomination, appointment, or election, or being the owner or lessee or occupant of any premises, knowingly permits the same to be used or occupied for any of such purposes, or keeps, exhibits, or employs therein any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depository for gain, hire, or reward of any money, property, or thing of value staked, wagered, or pledged, or to be wagered or pledged, upon any such result, or receives, registers, records, forwards, or purports or pretends to forward, to or for any race course, any money, thing, or consideration of value, bet or wager or money, thing or consideration, offered for the purpose of being bet or wagered upon the speed or endurance of

any man or beast, or occupies any place with books, papers, apparatus, or paraphernalia, for the purpose of receiving or pretending to receive, or for recording or registering or for forwarding, or pretending or attempting to forward in any manner, any money, thing, or consideration of value, bet or wagered, or to be bet or wagered, for any other person, or receives or offers to receive any money, thing, or consideration of value, bet or to be bet at any race track, or assists or abets in any manner in any of the acts forbidden by this section, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine of not more than $500, or undergo imprisonment of not more than one year, or both. 1939, June 24, PL 872, § 607.'

"By this provision of the Penal Code anyone who assists or abets in any manner the promotion of gambling on horse races, violates the laws of this commonwealth. The Commission is the instrumentality created by the legislature, to act as its agent in seeing to it that the public is furnished with adequate service at reasonable rates. In performing that duty the Commission should determine whether or not providing telephone service to complainant is consistent with the laws of this commonwealth. To act otherwise would defeat the legislative intent as expressed in the Penal Code of 1939."

. . . . . .

"The record in this complaint leaves little doubt that the publication and distribution of 'scratch sheets' is definitely identified with 'bookmaking' as outlawed by the 'Penal Code' of this commonwealth. That 'scratch sheets' are used by bookmakers in connection with the registering and recording of bets on horse races is clearly established. Thus, the telephone facilities of the respondent company when furnished to complainant would aid, abet, and provide the means whereby bookmakers and gamblers may be furnished information useful before making bets, and necessary before paying off winners.

. . . . . .

"There is no question that if the telephone facilities are furnished by the respondent to the complainant, they will be used, or may be used by bookmakers in the furtherance of an illegal purpose. To get an intelligent idea as to whether or not the two telephones which complainant proposes to install at 311 Ludlow building, Philadelphia, and additional telephones as the business develops, may be used in the furtherance of an illegal purpose, one must not isolate the parts that make up the whole of the operation. The race track, the horse races, the publication and distribution of a 'scratch sheet,' the telephone used for obtaining information before making bets and before paying off winners, the bookie that buys the 'scratch sheet' and uses it in carrying on his gambling business, and the betting that results from the publication and distribution and telephone information received from the complainant, must be looked at collectively as a plan and scheme as a whole, aiding and abetting the furtherance of gambling on horse races in this commonwealth.

. . . . . .

"The Bell Telephone Company of Pennsylvania, respondent, must face the realties of this situation. The pub-

lication and distribution of 'scratch sheets' and the telephone information furnished to buyers of 'scratch sheets,' by the publisher and distributor is definitely and conclusively aligned with horse-race gambling in this commonwealth. The respondent company was justified in concluding that from the nature of complainant's business the telephone facilities would be used, or might be used in the furtherance of horse-race betting which is contrary to law. By reason and by law, respondent company was justified in its refusal to furnish the complainant telephone service in connection with the operation of complainant's business, and the Commission will not direct the respondent company to provide such telephone service . . .". (35 PUR(NS) 91–93.)

Upon appeal these findings were wholly sustained by the superior court, and the duty of a telephone company to serve was defined as follows (*supra*, 143 Pa Super Ct at p. 554, 39 PUR (NS) at p. 425):

"The duty resting upon the telephone company, as a public utility and a common carrier, to furnish its service and facilities to the public generally and without discrimination, is limited to *lawful* service and does not extend to the furnishing of service used or intended to be used in violation of law or to aid in an unlawful undertaking. See Smith v. Western U. Teleg. Co. (1887) 84 Ky 664, 2 SW 483, and Western U. Teleg. Co. v. State ex rel. Hammond Elevator Co. (1905) 165 Ind 492, 76 NE 100, 3 LRA (NS) 153, 6 Ann Cas 880, where refusal to furnish telegraphic service to *bucket shops* was upheld; and Godwin v. Carolina Teleph. & Teleg. Co. (1904) 136 NC 258, 48 SE 636, 67 LRA 251, 103 Am St Rep 941, 1 Ann Cas 203, where refusal to install a telephone in a bawdyhouse was sustained."

We can perceive no essential difference between the facts of this case and the facts of the Plotnick Case, *supra*. If anything, the instant record must be regarded as containing more complete and definite evidence justifying the telephone company's refusal to serve than did the record in the Plotnick Case. Since Plotnick was not at the time actually engaged in publishing and distributing a scratch sheet, the use which would conceivably be made of his publication had to be determined by reference to the use made of other similar publications. In the instant case, however, the actual use of complainant's "scratch sheet" is conclusively established and complainant's business definitely linked with the operations of bookmakers and gamblers.

Complainant, in attempting to escape the principles of the Plotnick Case, has produced a mass of testimony tending to show that certain newspapers of general circulation presently served by respondent, publish virtually the same horse-racing information as does complainant in the total of their various editions, and argues that it is entitled to the same treatment at respondent's hands as that afforded to the newspapers. This position is wholly untenable. The instant record clearly reveals that newspapers of general circulation are not used by bookmakers in the conduct of their operations, and further, there is a sharp distinction which exists between newspapers and complainant's publication as stated by

the court in the Plotnick Case, *supra,* in the following language (143 Pa Super Ct at p. 556, 39 PUR(NS) at p. 427):

"The sheets are in no sense newspapers. They are confined to information as to horse racing, and tips as to the betting on the horses, supplemented by telephone service as to the winners and the pay-off. They could be of no interest except to the proprietors and employees of bookmaking and pool-selling establishments and their patrons or persons interested in betting on them at such establishments. The telephone and teletype service is installed (1) to secure the information needed for the publication of the sheets, and (2) to supply the results of the races to *purchasers of the sheets.* It would have no reason or excuse apart from the unlawful business of bookmaking and pool-selling."

Since this pronouncement was made after consideration of a record replete with evidence not only of Plotnick's proposed activities, but also of this complainant's actual activities, its applicability to the instant case cannot be doubted.

In view of all the foregoing we conclude that respondent was justified in believing that its facilities installed on complainant's premises had been used, and would be used in the future, in the furtherance of the illegal business of bookmaking and gambling and it was, therefore, justified in refusing to continue to serve complainant. The complaint must accordingly be dismissed.

Complainant has introduced a collateral matter into this proceeding which requires comment from us at this time. At the initial hearing held herein, and presided over by Commissioner Richard J. Beamish, complainant filed a "Suggestion of Disqualification" requesting the removal of Commissioner Beamish from participation both in the hearings and in the disposition of this case. Complainant alleged that certain public statements purported to have been made by Commissioner Beamish indicated bias on his part against complainant, and prejudiced complainant's ability to secure a fair and impartial adjudication of the issues here involved. Upon the presentation of the "Suggestion of Disqualification" the Commissioner placed an examiner in charge of the hearing and voluntarily withdrew therefrom, after a statement that his withdrawal was prompted not by reason of there being any merit in complainant's charges of bias, but because of the fact that such charges had been made.

While we do not consider that the Commission has a duty to pass upon the qualifications of its individual members to preside over hearings and to participate in Commission deliberations, we have in this case carefully examined the matters submitted by complainant in support of his "Suggestion of Disqualification" and we are of opinion that they completely fail to support any of the charges made. While it will serve no useful purpose to set forth here the alleged statements upon which complainant relies, we may observe that there is nothing contained therein which is indicative of bias against complainant in even the remotest degree.

All of the matters and things involved having been fully considered, therefore,

Now, to wit, January 12, 1942, it is

Ordered: That the instant complaint be and is hereby dismissed.

Commissioners Thorne and Morgal dissent; Commissioner Thorne files a dissenting opinion.

THORNE, Commissioner, dissenting: I dissent from the decision of the majority of the Commission which dismisses the complaint of the Pennsylvania Publications, Inc. against the Bell Telephone Company, in which the Bell Telephone Company proposes to discontinue service to the complainant because "it feared that if it did not discontinue its service to the complainant it would be charged with aiding and abetting the commission of the crimes of bookmaking and pool-selling and other offenses contrary to the laws of Pennsylvania and the United States."

The facts, as to the publication and distribution of a pamphlet, commonly called a "scratch sheet," bearing the caption, "William Armstrong—Jockeys, Scratches, Daily Sports," are set forth in the majority opinion and are substantially correct. It is admitted by the majority that the exact use made of this sheet cannot be ascertained. It is their contention that not only is it used by every bookmaker, but that it is an absolute necessity in order for them to conduct their business.

A great deal is made of the fact that in many raids conducted by the Philadelphia police, the complainant's "scratch sheet" was found, and that these bookmakers make it difficult for the police by using the numbers of the "scratch sheet," rather than the name of a horse on a betting slip.

This is obviously not the only method which could be used. Many of the leading newspapers publish similar information and the same result could be achieved by using either the post positions as published in the newspapers, or the newspapers' own system of numbering. It is certainly not the intention of the majority to discontinue telephone service to newspapers which can be and are used for a similar purpose. It is admitted that these "scratch sheets" are sold at newsstands openly, and apparently, legally, throughout the entire Philadelphia area. If such a publication is illegal, it is the duty of the regularly constituted law enforcement agencies to stop such sale. It is not the duty of this Commission to regulate either the morals or habits of the public by use of the powers conferred upon it by the act creating it.

The majority find that the telephone and teletypewriter service of the complainant "would be used" rather than could be used in the encouragement and furtherance of the bookmaking business, which, according to the majority, would use this service. This business exists not by reason of telephone service furnished by the respondent, but rather by failure of the law enforcement agencies to apprehend and put out of business such law violators.

It is manifestly impractical for the Bell Telephone Company to seek out and discontinue service to every law violator, or to everyone who aids and abets in law violations within the commonwealth of Pennsylvania, and such an order would impose an undue burden on the Bell Telephone Company. Consistent with the majority opinion, the respondent should immediately attempt to ascertain the names and cease

furnishing service to everyone in any way connected with the publication or distribution of this sheet, such as the carrier who transports it from New York, those parties who distribute it to the news-stands, the printer who prints the information contained therein, as well as the individual who might merely, out of curiosity, desire information such as is furnished by the complainant and who purchases a sheet and uses his own telephone to call for this information.

The next step for the Bell Telephone Company would be to carry it still further and include all those engaged in either actual violation or in abetting in the violation of other state and Federal laws, as, for example, those engaged in the mining, processing, distribution or purchase of "bootleg" coal. The individual citizen who orders coal from one who is illegally operating, would, under such procedure, be subject to loss of telephone service, as well as all other utility services, such as electricity, gas, and water. To carry this policy to its ultimate conclusion would involve the vast majority of the citizens of this commonwealth and would certainly be impossible to enforce.

It is my opinion that if this sheet which has been published for ten years is used, and there is nothing in the record to so indicate, exclusively for illegal purposes, it should be stopped by those whose duty it is to enforce the laws of the commwealth, and not only from publishing but from distributing said publication.

Merely because someone happens to use this sheet illegally is no reason to deprive those who, for reasons which may be perfectly legitimate, also desire to use the service furnished by the complainant. And whether it be a "scratch sheet," a newspaper, or any other publication furnishing information on horse racing which is conducted legally under the laws of the various states, no right is conferred upon this Commission to usurp the police power of either the city of Philadelphia or any other municipality.

For these reasons I not only register my protest but dissent from the opinion of the majority in this case.

Concurred in by Commissioner B. Frank Morgal.

SECURITIES AND EXCHANGE COMMISSION

Re Indiana Service Corporation

[File No. 70-464, Release No. 3302.]

Security issues, § 13.2 — Exemption under Holding Company Act — Financing business of subsidiary.

Exemption may be granted pursuant to § 6(b) of the Holding Company Act, 15 USCA § 79f (b), for the issue and sale of serial notes by a subsidiary of a registered holding company proposing to make a cash payment and to deliver the notes for the balance of the purchase price of

trolley coaches to be substitued for street cars, this being for the purpose of financing the business of the subsidiary company.

[January 30, 1942.]

APPLICATION *pursuant to § 6(b) of the Holding Company Act for exemption of serial notes of a subsidiary of a registered holding company; granted subject to conditions.*

APPEARANCES: Daniel F. Harrington, of the Public Utilities Division of the Commission; Von E. Livingston, of Fort Wayne, Indiana, appearing for Indiana Service Corporation.

By the COMMISSION: Indiana Service Corporation (hereinafter referred to as "Service Corporation"), a subsidiary of Clarence A. Southerland and Jay Samuel Hartt, trustees of the Estate of Midland Utilities Company, a registered holding company (hereinafter referred to as "Utilities"), has filed an application pursuant to the third sentence of § 6(b) of the Public Utility Holding Company Act of 1935, 15 USCA § 79f (b), for an exemption from the provisions of §§ 6 (a) and 7 of the act of the issue and sale of $404,448 principal amount of its serial notes in connection with the purchase of 40 trackless electric trolley coaches.

Pursuant to appropriate notice a public hearing was held on the application. No member of the public appeared or requested an opportunity to be heard. After considering the record, the Commission makes the following findings:

Service Corporation is a public utility company incorporated under the laws of the state of Indiana. It is engaged in the business of generating, purchasing, transmitting, and distributing electric energy in the north central and northeastern parts of the state of Indiana, including the city of Fort Wayne. It furnishes electric energy to approximately 26,900 customers, approximately half of whom are in the city of Fort Wayne where Service Corporation operates in competition with a municipally owned utility. Service Corporation renders gas service in the city of Delphi and distributes water in the city of Churubusco.

Service Corporation formerly operated interurban railways in north central Indiana and presently operates an electric street railway in the city of Fort Wayne. The interurban properties have been abandoned[1] and Service Corporation is now engaged in converting the city railway to a trackless electric trolley system. In 1940 it purchased 28 trolley coaches and converted part of its city railway to a trackless system. It now proposes to complete the change-over by the purchase of an additional 40 coaches. The total cost of completing the change-over, including the necessary overhead trolley system, and of removing rails and repaving the streets where track is now located, is estimat-

[1]With the exception of 18 miles of electric railway between Fort Wayne and Garrett, Indiana, which is used for the transportation of freight only, the largest portion of which is coal for use in the company's generating plant in Fort Wayne.

ed to be approximately $794,367. Of this cost $530,560 represents the price of the coaches.

Service Corporation proposes to acquire the coaches from the J. G. Brill Company, under a conditional sale agreement, at a price of $13,264 per coach, or a total of $530,560, subject to adjustment for variations of material and labor costs. Service Corporation will make an initial payment of $3,152.80 per coach or a total of $126,112 and will pay the balance, namely $10,111.20 per coach, or a total of $404,448, in 60 equal monthly instalments evidenced by the issuance of 60 serial notes to the Brill Company and secured by the coaches. Serial notes numbered 1 to 12, both inclusive, will bear interest at the rate of 3 per cent per annum and serial notes numbered 13 to 60, both inclusive, will bear interest at the rate of $3\frac{3}{4}$ per cent per annum.

Concurrently with the execution of the sale agreement, the Brill Company, the Lincoln National Life Insurance Company, the Fort Wayne National Bank (both as trustee and in its individual capacity), and Service Corporation will execute a purchase trust agreement whereby the bank, as trustee, will purchase the notes from the Brill Company at face amount, plus accrued interest, with funds provided by the bank and the insurance company in the following proportions:

Bank: (14 notes)	$94,371.20
Insurance company: (46 notes) ..	310,076.80
Total	$404,448.00

Officers of the company testified that the city transit system is in need of rehabilitation and that additional rolling stock is required to serve increasing traffic demands due to a considerable extent to war industries in Fort Wayne. It is estimated that the purchase and placing in service of the trolley coaches, will require less cash than the cost of rehabilitating the present street car lines.[2] Operation of the Street Railway Division for the year ended December 31, 1940, resulted in a loss of $26,590.81. Operation for the year 1941 (December estimated) resulted in a profit of $90,000. Estimates for 1942 show an expected profit of $137,000 or a 5.2 per cent return on the approximate capital, $2,644,000, invested in transportation facilities.

The proposed transactions were approved by the Public Service Commission of Indiana on December 4, 1941 (consolidated causes Nos. 15485 and 15486), and it appears that the issue and sale of the serial notes by Service Corporation are solely for the purpose of financing its business. Service Corporation is, therefore, entitled to the exemption set forth in the third sentence of § 6 (b) for the issue and sale of the said serial notes, and our jurisdiction under the act is limited to imposing such conditions as we deem necessary or appropriate in the public interest or for the protection of investors and consumers in connection with our granting the said exemption.

The need for a recapitalization of, and for a fair and equitable redistribution of voting rights in, Service Corporation is recognized by the company, and by its parent, Utilities. The surplus deficit of the company, per books, as of October 31, 1941, was $6,571,-

[2] Estimated cost to rehabilitate street car lines, $1,376,457.

999. Writing off the balance of Service Corporation's present street railway will have the effect of increasing the surplus deficit by $2,732,726.22.[3] Moreover, there is recorded on the balance sheet of Service Corporation as "Retirement Work in Progress" approximately $1,092,574, of interurban property abandoned, against which there is no reserve and which, officers of Service Corporation testified, will be charged off against surplus deficit. The abandonment and write-off of the street railway properties and the write-off of the abandoned interurban properties will increase the surplus deficit to approximately $10,397,299.22. The record indicates that the finally adjusted surplus deficit will exceed this figure since the depreciation reserve is admitted by the company to be inadequate.[4]

The capital stock of Service Corporation consists of $3,032,800 of preferred stock[5] and $7,380,000 of common stock. Thus, the adjusted surplus deficit is approximately equal to Service Company's capital stock account without taking into consideration other possible surplus deficit adjustments, including whatever adjustments may be required properly to abate the depreciation reserve. The long-term debt of Service Corporation at October 31, 1941, amounted to $16,443,055, of which $3,846,102 represented demand notes to Utilities and interest thereon.

The record indicates that there is a present need for the coaches which Service Company proposes to purchase and that the conversion of the balance of its transit system into a trackless trolley system will result in additional income to Service Company.

It would be highy desirable for Service Corporation to acquire the coaches without incurring additional long-term debt. However, the record indicates that the company's relatively favorable net current asset position, including approximately $1,100,000 in cash, should be maintained in order that the company will be able to meet construction expenditures which have risen and which probably will continue to arise due to increased service demands by war industries in the Fort Wayne area.

The record further indicates that Utilities, the parent of Service Company, is in the process of reorganization pursuant to § 77B of the Bankruptcy Act, 11 USCA § 207, and is unable to render financial assistance to Service Corporation. Service Corporation's capital structure is such that it is unable to raise the required new money for the purchase of the coaches except as proposed herein.

In view of the fact that Service Corporation and Utilities have stated on the record that either or both of them will file as soon as possible a plan for the recapitalization of the company and for a fair and equitable redistribu-

[3] The decrease in plant resulting from the abandonment of the street railway property will amount to $2,800,000 against which is carried a reserve of $67,273.78, leaving a balance of $2,732,726.22 to be charged to surplus (deficit).

[4] The plant account per books as of October 31, 1941, was recorded at $18,022,831. The depreciation reserve at the same date was $1,006,907 or 5.6 per cent of plant. The pro forma plant account as of the same date, giving effect to the proposed transactions, is $15,917,198 and the depreciation reserve $939,633 or 5.9 per cent of plant.

[5] Dividend arrearages on the preferred stock as of October 31, 1941, amounted to $1,899,668.

tion of voting power among the security holders of Service Corporation, we shall not impose any condition herein intended to improve the corporate structure of Service Corporation. In the event that a fair and equitable plan is not filed by Utilities or the company or both of them within a reasonably short time, the Commission will take such action as it deems necessary to cause Service Corporation to conform to the appropriate sections of the act, particularly § 11 thereof, 15 USCA § 79k.

In view of the necessity for preserving Service Company's current cash, as stated above, we shall impose the condition in our order that Service Corporation shall not pay any of the principal, or interest, on its demand notes to Utilities.

ORDER

Indiana Service Corporation (hereinafter referred to as "Service Corporation"), a subsidiary of Clarence A. Southerland and Jay Samuel Hartt, trustees of the estate of Midland Utilities Company (hereinafter referred to as "Utilities"), a registered holding Company, having filed an application pursuant to the third sentence of § 6 (b) of the Public Utility Holding Company Act of 1935 for an exemption from the provisions of §§ 6 (a) and 7 of the act of the issue and sale of $404,448 principal amount of Service Corporation's serial notes maturing in sixty equal monthly instalments (notes 1 to 12, inclusive, bearing interest at the rate of 3 per cent per annum from date until payment and notes number 13 to 60, inclusive, bearing interest at the rate of 3¾ per cent per annum from date until payment) for the purpose of paying part of the purchase price of 40 electric trackless trolley coaches; and

A public hearing having been held upon such application, as amended, after appropriate notice, the Commission having considered the record and having made and filed its findings and opinion herein:

It is *ordered* that said application, as amended, be and the same hereby is granted subject, however, to the conditions set forth in Rule U-24 and to the further condition that Service Corporation shall not, unless it first obtains an order of this Commission, pay any of the principal or interest accrued or to be accrued on its demand notes payable to Utilities.

UNITED STATES DISTRICT COURT, D. MINNESOTA
THIRD DIVISION

Ernest E. Moore, Doing Business As Moore Motor Freight Lines

v.

United States et al.

[No. 253 Civ.]

(41 F Supp 786.)

Appeal and review, § 30 — Scope of review — Supporting evidence.

1. The court's review of Commission action under the Motor Carrier and Interstate Commerce Acts is limited to the question of whether there is substantial evidence to support the Commission's findings, and even though the evidence might support a different inference, the court may not substitute its judgment for that of the Commission, p. 190.

Certificates of convenience and necessity, § 60 — "Grandfather" rights — Statutory construction.

2. The provision of the Motor Carrier Act defining common carriers must be read in connection with the "grandfather" clause in determining whether an applicant is entitled to a certificate under that clause, p. 191.

Public utilities, § 52 — Brokers in utility service — Motor carriers.

3. Indirect operations of forwarders through independent carriers are not within the scope of the Motor Carrier Act, p. 191.

Certificates of convenience and necessity, § 61 — "Grandfather" rights — Character of service.

4. To qualify as a bona fide common carrier by motor vehicle within the "grandfather" clause of the Motor Carrier Act, an applicant must have performed the carriage, either by equipment of his own, or such as he had under lease; the operation must have been lawful and there must have been responsibility to the public and shipper, p. 191.

Certificates of convenience and necessity, § 62 — "Grandfather" rights — Extent of prior operation.

5. A certificate cannot be granted under the "grandfather" clause of the Motor Carrier Act where the applicant had not been operating for a period of two months prior to the time of the hearing on the application, p. 192.

[November 17, 1941.]

SUIT *to set aside and permanently enjoin enforcement of order denying certificate under "grandfather" clause of Motor Carrier Act; complaint dismissed.*

APPEARANCES: Thomas W. Walsh, of St. Paul, Minn., for plaintiff; S. R. Brittingham, Jr., Special Assistant to Attorney General, for United States; Allen Crenshaw, of Washington, D. C., Attorney, Interstate Commerce Commission, for Interstate Commerce Commission.

Before Sanborn, Circuit Judge, and Bell and Sullivan, District Judges.

PER CURIAM: This is a statutory suit, 28 USCA §§ 41 (28) 43, 48, to set aside and permanently enjoin the enforcement of an order of the Interstate Commerce Commission, entered on March 13, 1941, in a proceeding before it, wherein plaintiff was the applicant, entitled, "No. MC–17481 et al., filed February 12, 1936, Ernest E. Moore, common carrier applications." Interlocutory judgment has been applied for. At the hearing upon this application the evidence taken before the Commission was introduced in evidence, and the case, upon stipulation of the parties in open court, has been submitted for final decree.

The plaintiff in his complaint alleges that he was, on June 1, 1935, and continuously thereafter has been a carrier by motor vehicle, engaged in bona fide operation over the public highways in the states of Minnesota, Wisconsin, Illinois, Nebraska, Iowa, South Dakota, and North Dakota, transporting goods for the general public and for specific contract shippers; that he is and was entitled to have issued to him under the provisions of the Motor Carrier Act of 1935, 49 USCA § 306(a), a certificate authorizing him to continue his operations as a motor carrier. His applications, seeking certificates of authority to operate as a common carrier, contract carrier, irregular common carrier, or as a broker for the transportation of goods in interstate commerce, were filed with the Commission on or about February 12, 1936. After a hearing before the Commission, and on March 13, 1941, said applications were denied. Application for a reconsideration of the March 13th order was likewise denied. The complaint alleges further that the Commission improperly construed the Motor Carrier Act, that the defendant Commission, in making its report and conclusions, acted arbitrarily and unlawfully, and in conflict with the evidence before it; that the proof submitted by the plaintiff clearly shows that he is entitled to certificates as a common carrier over the routes set forth in his applications. Plaintiff prays that the orders of the Commission denying his applications for authority to continue his operations as a motor carrier be set aside, that defendants be restrained from prosecuting the plaintiff for alleged violations of the Motor Carrier Act, and for such other relief as may be proper in the premise.

The defendants in their answers admit that the plaintiff applied to the Commission for certificates of public convenience and necessity, that hearings were held, evidence taken in the matter of said applications, and that the Commission made orders denying petitioner's applications; that an application by plaintiff for a reconsideration of said orders was likewise denied. The defendants deny that the Commission improperly construed said Motor Carrier Act, that it acted arbitrarily, unlawfully and in conflict with the evidence before it, and that

the proof submitted by the plaintiff entitles him to certificates of authority to operate as a common carrier, and pray that the action of the plaintiff be dismissed.

The plaintiff contends in his oral and written arguments that (1) the orders of the Commission deprive the plaintiff of his property without, and deny him, due process of law in that the orders are based upon matters foreign to, and outside of the record; (2) that the findings of the Commission are not supported by substantial evidence; (3) that the orders and ultimate conclusions of the Commission are not supported by facts, or the primary facts, as found by the Commission; (4) that the Commission's denial of plaintiff's motion for rehearing before it was arbitrary and unreasonable.

Section 206(a) of the Motor Carrier Act of 1935, 49 USCA § 306(a), provides that no common carrier by motor vehicle shall engage in interstate or foreign commerce without a certificate of convenience and necessity issued by the Commission. However, it is provided in said section that if any such carrier was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and continued said operation since that time, the Commission should issue such certificate without requiring further proof of public necessity or convenience. This last referred-to provision is known as the "grandfather" clause.

It appears that the plaintiff, on February 12, 1936, filed with the Commission four applications under the "grandfather" clause of said Motor Carrier Act, seeking certificates of public convenience and necessity, or a permit authorizing continuance of operation: (1) in MC–17481, as a common or contract carrier by motor vehicle between Minneapolis and St. Paul, Minnesota, and Chicago, Illinois, over two regular routes, one through Madison, Wisconsin, and the other through Rochester, Minnesota, and Waterloo, Cedar Rapids, and Clinton, Iowa; and between points in Minnesota, Iowa, Wisconsin, and Illinois, over numerous specified routes; (2) in No. MC–21231, as a common or contract carrier between points in Minnesota and points in Wisconsin, Illinois, Nebraska, Iowa, North Dakota, and South Dakota, over undescribed regular and irregular routes; (3) in Nos. MC–19693 and MC–24697, applicant seeks authority embraced in whole or in part within the two above referred-to applications.

By application under § 211 of the Motor Carrier Act, 49 USCA § 311, in No. MC–80532, filed on February 12, 1936, plaintiff applied for a license authorizing operation as a broker for the purpose of arranging transportation of general commodities by rail, water and motor vehicle. This last application, however, was abandoned, and no evidence was adduced bearing thereon. The plaintiff, before the Commission, limited his applications to authority to operate over the routes set out in said applications in the states of Minnesota, Iowa, North Dakota, South Dakota, Wisconsin, and Illinois. The applications were heard on a consolidated record.

The facts may be summarized as follows: Plaintiff in 1906 became engaged in the local cartage business in St. Paul and Minneapolis, Minnesota,

and continued exclusively in that business until 1929, first using motor vehicles in the year 1916. In 1929 he commenced long-distance operations by motor vehicle. On June 1, 1935, plaintiff owned outright a pick-up truck which he used to transfer freight from customers to his garage, where the freight was transferred to larger trucks. He claims to have been the owner of a truck and trailer which apparently was in the name of one Arlo Davis. This truck was operated through the state of Wisconsin. He used twelve or fourteen trucks under oral leases, and claimed to have an equity in four pieces of this equipment, created by the advancement of money to the owner-operators for payment on their respective finance contracts covering equipment. There is no evidence of any lien on these trucks. Open notes were taken to cover such advancements. Davis secured authority to operate in Wisconsin in September, 1934, and filed public liability and property damage insurance with the Wisconsin authorities in connection with his permit.

The Davis equipment was operated principally in Wisconsin, occasionally in Iowa, never in North Dakota, and plaintiff was unable to state that it was ever used in Illinois. Plaintiff's name did not appear on this equipment. Davis transferred whatever title he had in this equipment to the plaintiff early in the year 1936, and plaintiff operated this equipment until February, 1937. However, at the time of the hearing in 1937, this equipment was not in use and had not been in use for two months prior thereto. There was no explanation given as to the discontinuance of its use. Davis severed his connections with Moore at the time of the transfer of title of said truck. While he was operating the truck he was paid a salary of $175 per month. However, he was to pay any necessary help.

Under plaintiff's arrangements with owner-operators other than Davis, when sufficient freight had been secured by him he would select a truck owner having operating permits in the states to be entered in the transportation of the shipments. The truck owners used by plaintiff were generally paid 90 per cent of the total freight charges collected, although in some instances they were paid on a trip, mileage, or hourly basis. It may be generally stated that the plaintiff received ten per cent of the gross freight charges collected for his services. The owner-operator hired and paid such extra drivers and helpers as were needed, paid all operating expenses, secured in their own names such state authorities as were held, and were themselves reponsible for any fines or penalties for violations of state laws, for damage done to their vehicles, or for injuries to third persons. Plaintiff's name did not appear on the trucks. At all material times, plaintiff solicited shipments, both truck-load lots and less, for movement over the St. Paul, Minneapolis and Chicago routes, operations over which were conducted several times per week, and truck loads over other routes which were irregularly served, except that he would accept 5,000-pound cargoes over the latter routes.

Plaintiff estimated that he handled 20,000,000 pounds of freight during each of the years 1935 and 1936. He instructed the driver where to get the

load, where to deliver it, and, in most instances, the route to follow, and made certain the truck was in suitable condition to make the trip. He adjusted claims and carried cargo insurance, but charged the truckers 1.5 per cent of their earnings on those shipments to cover such insurance. He made advances to truckers to cover their expenses, which were later repaid by the truckers. The shipments in many instances were covered by plaintiff's freight bills. However, at times, truck-owners moved shipments on their own billing. The plaintiff maintained a general office in the city of St. Paul and had an arrangement with a filling station operator at Chicago, Illinois, to handle such business as he might have in the state of Illinois. The arrangement at Chicago was not for the exclusive benefit of the plaintiff. The filling station operator had the privilege of either turning the business over to the plaintiff, or to such of the owner-operators hauling for the plaintiff as were permitted to accept shipments on their own account. Plaintiff advertised in telephone books and periodicals as a common carrier. In 1936 plaintiff signed written leases with many of the owner-operators. However, his relations with them were conducted in the same manner as previously. The written leases contain the following provisions: "Provided, further, that the said lessee [plaintiff] shall be under no liability or obligation whatsoever to make any improvements or repairs upon said motor vehicles, to pay for any licenses, permits, certificates, or insurance necessary or convenient to the operation of the same, nor shall the said lessee be liable for any accidents or damage sustained or suffered by the said motor vehicles or third persons, whether the same be due to the negligence of lessee or otherwise."

The plaintiff had no state permits authorizing his operation in any of the states covered by the applications during the year 1935. It appears that in Illinois no permit was required for the operation of trucks during the year 1935.

Some of the owner-operators applied for authority under the "grandfather" clause. These applications were drafted in the office of the plaintiff, with his knowledge.

The plaintiff was registered under the National Industrial Recovery Act, 48 Stat. 195, and the Code of Fair Competition for the trucking industry for the state of Minnesota prior to June 1, 1935.

The Commission found that the applicant had failed to establish that he was, on the statutory date and continuously ever since, in bona fide operation in interstate or foreign commerce as a common or contract carrier by motor vehicle between any points whatsoever, and that the applications should be denied. The denials of the applications were apparently based on the grounds that the plaintiff had failed to meet the burden of proof imposed upon him with respect to his applications for authority under the "grandfather" clause; that the operations of the owner-drivers could not be used in determining plaintiff's operating rights, and that any rights which he might be entitled to necessarily rested on the operation of the Davis equipment; that there was a failure of proof to show what ship-

ments, if any, were transported in that equipment; that if such operation of the Davis equipment could be considered bona fide, there was a substantial interruption thereof after the statutory date.

The first contention made by the plaintiff requires no discussion, since the plaintiff has failed to point out in his oral or written arguments (and we have been unable to find from a search of the record) any matter foreign to, or outside the record which has been found as a fact or suggested as a basis for any conclusion thereon by the Commission.

Although it is generally claimed by the plaintiff that the findings of the Commission are without support in the evidence, and are arbitrary, in his complaint he attacks the findings in certain instances. From a search of the record we have been unable to find any specific instance where the findings are without support in the evidence.

The plaintiff has testified that all equipment used by him on the statutory date, save the Davis equipment, was operated under lease, and he claimed to have had an equity in some four or five pieces of such equipment. The plaintiff advanced money to these truckers on occasion, taking their unsecured notes for the advances which were subsequently deducted from the earnings of the truckers, but the plaintiff never had a lien or mortgage on any of said equipment. While the plaintiff carried cargo insurance, and in the first instance paid for it, he charged the same back against the trucker and deducted the amount thereof from the earnings of the trucker. The truckers, at their own expense, furnished public liability and property insurance, and also workmen's compensation insurance. The billing of freight was not in all instances in the name of the plaintiff. At times the truck owners moved shipments on their own billings. The plaintiff advanced money to truckers for supplies. These advances were later deducted by the plaintiff from the earnings of the trucker. The plaintiff maintained an office and had one employee in St. Paul, on the date of the hearing. He had an arrangement with a service station operator at Chicago to accept telephone calls which had to do with the Chicago business.

[1] The court's review of the evidence, both in cases under the Motor Carrier Act, 49 USCA § 301 et seq., and under the Interstate Commerce Act, 49 USCA § 1 et seq., is limited to the question of whether there is substantial evidence to support the findings of the Commission. The court is not permitted to question the soundness of the reasoning upon which the conclusions of the Commission were reached, nor the weight of the evidence. These matters are for the consideration of the Commission. The Commission's findings will be disturbed only when they are arbitrary and without support of substantial evidence. See Ohio Bell Teleph. Co. v. Ohio Pub. Utilities Commission (1937) 301 US 292, 81 L ed 1093, 18 PUR(NS) 305, 57 S Ct 724; Loving v. United States (1940) 32 F Supp 464, affirmed per curiam (1940) 310 US 609, 84 L ed 1387, 60 S Ct 898; United States v. Maher (1939) 307 US 148, 83 L ed 1162, 28 PUR (NS) 95, 59 S Ct 768. Even though the evidence might support a different

inference, the court is not permitted to substitute its judgment for that of the Commission. See Swayne & Hoyt v. United States (1937) 300 US 297, 307, 81 L ed 659, 57 S Ct 478.

A careful examination of the record made before the Commission satisfies this court that the findings of the Commission are founded upon substantial evidence.

The plaintiff argues that "The finding that petitioner allegedly had not leased equipment and that it had not been operated under his direction and control fails utterly and completely to sustain the Commission's conclusion that for such reason petitioner was not a common carrier in that the statute imposes no such conditions," and that the Commission erred as a matter of law in its construction of the Motor Carrier Act in denying petitioner's claim for "grandfather" certificates.

[2, 3] The plaintiff invokes the "grandfather" clause as the basis for his right to certificates. To entitle him to a certificate under that clause he must show that he "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935" and continuously thereafter. In determining whether or not plaintiff is entitled to certificates under the "grandfather" clause, § 203, subdivision (a)(14), 49 USCA § 303(a)(14), must be read in connection with § 206(a) of the act.

Section 203(a)(14) defines a common carrier by motor vehicle under the Motor Carrier Act as "any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, . . ."

This section was amended in the Transportation Act of 1940. The words "by lease or any other arrangement" were omitted in the new act. 49 USCA § 303(a)(14).

The provision of § 206(a) that no "common carrier by motor vehicle . . . shall engage in any interstate . . . operation on any public highway" without a certificate "indicates that indirect operations of forwarders through independent carriers are not within the scope of the act." Acme Fast Freight v. United States (1940) 30 F Supp 968, affirmed per curiam (1940) 309 US 638, 84 L ed 993, 60 S Ct 810.

[4] In ascertaining the rights of an applicant under the "grandfather" clause, many elements must be considered. The bona fides of the operation, the regularity and extent of the operation, the equipment in use, whether owned or leased, the applicant's control or lack of control over the operators and equipment, the relationship existing between applicant and operator, the lawfulness of the operations in the different states, and the applicant's responsibility to the public and shipper, are all matters which should be inquired into and appraised.

In the instant case we are dealing with the question of whether the plaintiff qualified under the statutory definition in the Motor Carrier Act of a common carrier, and not with questions arising from the relationship of master and servant, or principal and agent. It may be said that the plaintiff held himself out on the statutory date as a common carrier by motor vehicle, but the question remains, did

he perform the transportation. To qualify as a common carrier by motor vehicle, he must actually have performed the carriage, either by equipment of his own, or such as he had under lease. He must have had control, in either event, of the equipment. Loving v. United States, *supra*. His operation must have been bona fide, and in compliance with the laws of the states through which his equipment passed. McDonald v. Thompson (1938) 305 US 263, 83 L ed 164, 27 PUR(NS) 31, 59 S Ct 176. There must have been responsibility to the public and the shipper without avoidance thereof.

This court expressed itself in O'Malley v. United States (1941) 38 F Supp 1, 3, in respect to the tests applied by the Commission to "grandfather" applications, as follows: "The Commission appears to have consistently ruled that to be a carrier by motor vehicle one must have direction and control of the motor vehicles which do the carrying for him, so that he is responsible both to the shipper and to the general public for their operation; or, in other words, that with respect to the motor vehicles which he uses he must stand in the relation of proprietor by virtue of ownership, lease, or other arrangement, and that mere user, in the absence of control or direction, even though exclusive, is not enough." (Citing cases.)

The construction which the Commission has placed upon the words "by . . . any other arrangement" in § 203(a) (14) of the act has met with the approval of the court. See Acme Fast Freight v. United States, *supra*.

[5] The purpose of the Motor Carrier Act is regulatory. The intention of the Congress in inserting the "grandfather" clause in the act was, no doubt, for the benefit of carriers who had been in bona fide operation previous to and on the statutory date, and continuously thereafter, up and to the time of hearing on the application for authority. To obtain authority to operate under that clause, the act requires that the applicant establish the fact that he was in bona fide operation at the material times. The Commission has said by its orders that the plaintiff failed to meet the requirements of proof, and with this conclusion we do not disagree.

As to the plaintiff's operation of the Davis equipment, there is evidence that the same was not operated by the plaintiff for a period of two months prior to the time of the hearing. No explanation of the discontinuance of the operation of that equipment was given. No "grandfather" claim can be based on that type of operation. See United States v. Maher, *supra*.

It is our conclusion that the findings of the Commission are supported by substantial evidence, that there is no evidence of arbitrary action, and that there has not been an improper construction of the Motor Carrier Act. The bill of complaint will be dismissed.

The Robertshaw book "Measured Heat" has become a competent cooking manual in thousands of schools and colleges.

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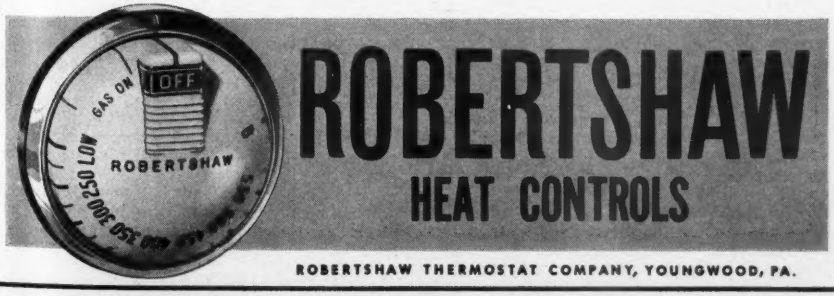


Industrial Progress

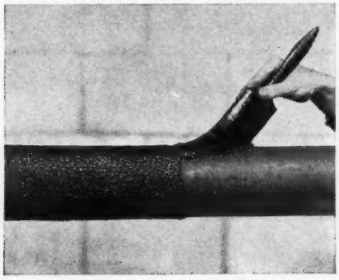
Selected information about manufacturers, new products, and new methods. Also news on utility expansion programs, personnel changes, recent and coming events.

Equipment Notes

New Plastic Coating Stops Drip

After three years of research and tests under all conditions, the J. W. Mortell Company, Kankakee, Illinois, announces NoDrip, an improved plastic cork coating that stops dripping from condensation or sweating pipes, walls, ceilings, tanks, etc.

The first product of this kind introduced by this company for the same purpose was more limited in its use to large areas because it required power spray equipment to apply it, but NoDrip has a greatly enlarged field, due to its easier and quicker method of application by using an ordinary paint brush.



Cork Coating Easily Applied

NoDrip is spread ¼" thick over any metal, concrete, brick, plaster, tile, wood, composition, galvanized or painted surfaces, corners, angles or corrugated ceilings. NoDrip can be painted any color.

Complete information is contained in a new illustrated circular showing interesting uses of NoDrip and a copy will be sent on request.

Switchboard Watthour Meter

For central station and industrial use, a new line of switchboard watthour meters is announced by Westinghouse Electric and Manufacturing Company.

Known as Type CB, the units are available for metering all the various combinations of single phase or polyphase power. Mounting styles are flush, projection and a detachable or plug-in construction. The detachable models can be readily removed for overall inspection and test without interrupting the circuit. All the calibration adjustments are accessible from the front when the molded glass covers are removed.

Egry Devises Pass and Registration System

The Egry Register Company, Dayton, Ohio, has devised a pass and registration system to be used in connection with the Egry Tru-Pak Register. This system is said to be fool-proof, and is adaptable for defense plants, government owned and operated plants and any other type of business where registration is mandatory.

The Egry Registration System consists of a triplicate form; one copy is the visitor's pass, which is slipped over a button on his coat. A colored target is affixed to the pass to indicate the department the visitor is calling on. A second copy of the form remains at the reception desk and the third is filed in the locked compartment of the Egry Tru-Pak Register. Space is provided on the form for whatever information is required, depending upon the type of work produced by the concern.

According to The Egry Register Company, this registration system is exceedingly flexible and may be made to fit the requirements of any plant.

Fluorescent Starter

A new line of fluorescent lamp starters, designed to protect ballast and starter and to eliminate the flashing of failed lamps, is announced by Hygrade Sylvania Corporation, Salem, Mass.

Called the "Hygrade Premium Mirastat Starters," they are, according to Hygrade engineers, entirely different in principle from any other starters of the kind so far introduced.

Automatically opening the circuit when a lamp fails, the Premium Mirastats are especially suitable for installations that make immediate replacement of a burned-out lamp impractical.

Hygrade recently announced that the rated life of the 100 watt fluorescent lamp has been increased from 2500 hours to 3000 hours.

Luminaire Mounting Bracket

A new 21-inch galvanized cast iron bracket, to be used primarily for mounting the General Electric Form 54 substation luminaire on outdoor substation structures, has been announced by the G-E Lighting Division at Schenectady, N. Y. The flat end plate and outlet box on the bracket fasten to channel or angle members with through bolts. The outlet box may be mounted either in back or in front of the supporting member, and is supplied with tapped opening for ¾-inch conduit, which can be oriented to permit entrance from any direction.

Equipment Notes (Cont'd)

Safety Transformer Reduces Fire Hazards

The Acme Electric & Mfg. Co. of Cuba, N. Y., announces a safety transformer for use on two 32-volt a.c. extension lines providing light for men working where gases or vapors exist.

This unit is also adapted for inspection work where workmen must come in contact with moist surfaces or conditions because the lower voltage prevents severe shock due to defective wires or wiring.

Portable Transformer Promotes Safety

The Acme safety transformer is a compact portable instrument and can be plugged into a 110 volt a.c. circuit. It is heavily insulated throughout, and is approved by the Underwriters' Laboratories.

New Process Increases Life of Fluorescent Lamps

Hygrade Sylvania Corp. has announced a new manufacturing process which increases the life and initial brilliance of fluorescent lamps and also eliminates subsequent development of dark streaks, splotches or shadowy end-bands.

Basis of the new process is the explosion of a mercury "bomb" in the interior of the lamp tube during manufacture, thereby regulating exactly the amount of mercury in the lamp, and producing the improved performance claimed for the method.

The process, which has been granted a patent and is now being announced to the lighting industry, is already in operation in the new fluorescent plant of the company in Danvers, Mass.

Outdoor Protector

To safeguard watthour meters and secondaries of transformers against lightning, a new outdoor protector is announced by the Westinghouse Electric and Manufacturing Company.

With a cutoff line to ground rating of 500 volts rms, the unit is for application on 3-phase circuits of from 110 to 575 volts. Discharge capacity is 20,000 amperes crest, and gap breakdown on impulse is 2500 volts average.

Enclosed in a wet-process porcelain casing to obtain moisture-proof construction, the unit is made up of porous block Autovalve elements.

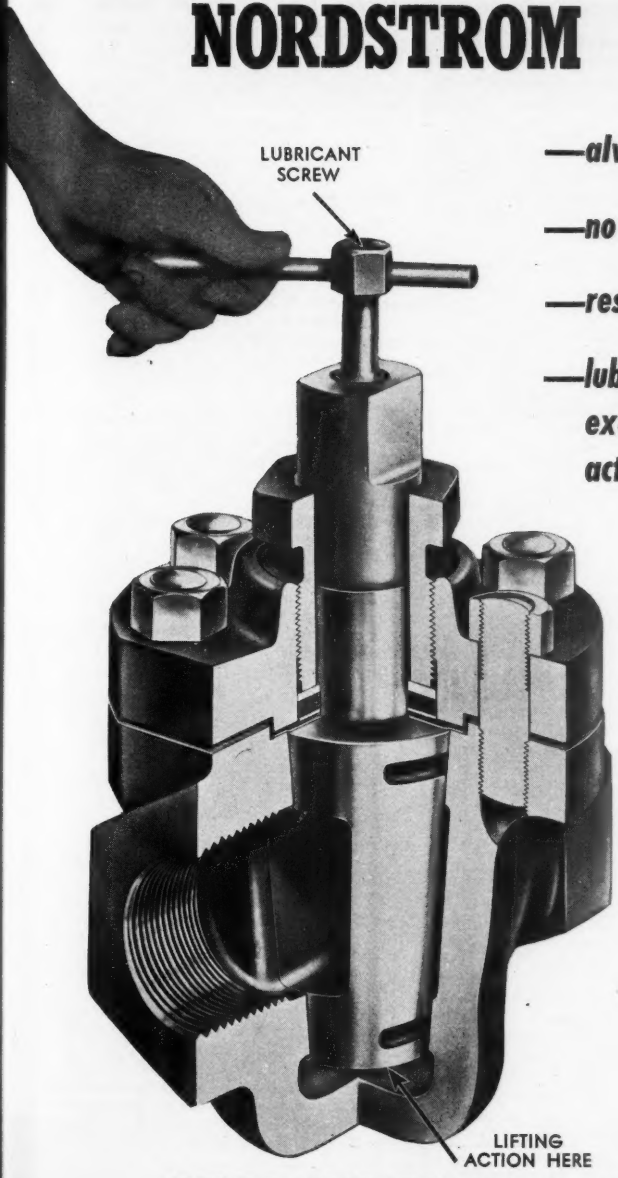
When installing, the protector ground load is grounded to the meter case or conduit, equalizing the meter coil and protector potentials. This eliminates the possibility of a flashover from the meter case to the potential coils in meters which are insulated in accordance with modern practice.

New De Luxe Acousti-Booth Announced By Burgess

A new de luxe model Burgess Acousti-Booth, a doorless booth which provides quiet and privacy for telephoning, has just been announced by the Acoustic Division, Burgess Battery Company, 2825 W. Roscoe St., Chicago. Its wooden construction not only conserves steel for national defense, but also makes it possible for the Acoustic Division to furnish this booth on orders without priorities or other restrictions.

Booth Requires No Priorities

NORDSTROM VALVES



—always easy to turn

—no sticking

—resistant to leaks

—lubricant screw exerts hydraulic action.

SIZES:
1/2" to 30"

Pressures:
up to 7500 lb. w.p.

Temperatures:
as high as 1000° F.

Ask for Bulletin

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Manufacturers' Notes

Allis-Chalmers Appointment

Ralph R. Newquist has been named as assistant to Walter Geist, vice president of the Allis-Chalmers Mfg. Co., according to a recent announcement.

Mr. Newquist was formerly the manager of the Allis-Chalmers company's district office at Houston, Texas. He also has served in the firm's Chicago, Pittsburgh, and Boston offices.

C. W. Schweers succeeds Mr. Newquist as manager of the Houston office.

Safety Advisory Service

The adoption of a comprehensive safety program is one method of helping speed up war production, according to the American Optical Company of Southbridge, Mass. Recent statistics show that industrial accidents last year advanced between 10 and 15 per cent over the previous year, hence the necessity of taking adequate preventive steps to conserve the manpower needed for production.

Accordingly, American Optical Company is making available a free safety advisory service for industrial plants so that plant managers and safety engineers can take advantage of the optical concern's many years of experience in the safety field. This safety service includes: A survey of industrial plants by a trained American Optical industrial representative to locate those hazardous jobs which require eye-protection equipment, respirators, or safety garments; a definite program to prevent accidents—and a plan to enlist the coöperation of foremen and workers; personal detailed check-ups of the entire safety program to insure best results; and posters, constructive messages on eye protection, and other literature that will keep everyone mindful of the safety work.

Railway & Mill Supplies Division Liquidated by M. M. & M.

Manning, Maxwell & Moore, Inc., is liquidating its Railway and Mill Supplies Division at Jersey City, New Jersey. This division, which has been in operation since the late seventies, has been conducted as a jobbing agency for the selling of supplies manufactured by other industries around the country.

In making the announcement, Mr. R. R. Wason, president, stated that the liquidation of this division will result in a great strengthening and expansion of the strictly manufacturing end of M. M. & M.'s business which will make possible a greater increase in the company's war production.

Timken Adopts War-Time Slogan

"Timken's Job: To Axe the Axis with Axles!" has been adopted by The Timken-Detroit Axle Company as its war-time slogan and goal. The company has been operating for nearly two years on a 24-hour, 7-day-a-week schedule. Despite this all-out effort, facilities have been further expanded and production totals continue to climb.

G-E Appointment

The appointment of S. N. F. Hedman as designing engineer of the mechanical drive section of the turbine engineering department of General Electric's River Works has been announced by Works Manager N. J. Darling.

Mr. Hedman succeeds R. G. Standerwick who is relinquishing his position as designing engineer to devote all of his time to another department.

B. W. Clark Named Westinghouse Sales Head

B. W. Clark, vice president in charge of the Westinghouse Electric and Mfg. Company's merchandising division, has been appointed vice president in charge of sales of the company. He succeeds Ralph Kelly, who resigned to become executive vice president of the Baldwin Locomotive Works.

In addition to supervising the sale of apparatus, Mr. Clark will be responsible for coördinating all sales of the Westinghouse company and its subsidiaries. He will transfer his headquarters from Mansfield, Ohio, to Pittsburgh, Pa.

Catalogs and Bulletins

P&H Excavator Design

A new bulletin (X61-1) released by the Harnischfeger Corp. on the 1½-yard P&H Model 655-A excavator describes each feature of construction, from crawlers to boom point sheave, bearing heavily on performance and durability. Large photos bring out the details of the 655-A's true tractor type crawler design, its all-welded rolled alloy steel upper and lower frames, low-pressure hydraulic control, and other important P&H improvements.

Like other P&H excavators, the No. 655-A is built for quick changeover to either shovel or dragline, crane or clamshell. As a crane, its boom and load can be raised or lowered simultaneously without reversing the engine.

A copy of the bulletin may be obtained from the Harnischfeger Corp., Milwaukee, Wis.

Jackbits

The advantages of detachable Jackbits are described in a 2-color, 24-page bulletin announced by Ingersoll-Rand Company. This new bulletin, which is titled "How Jackbits Reduce Rock Drilling Costs," contains more than fifty illustrations, a table showing the

Catalogs and Bulletins (Cont'd)

types of Jackbits recommended for different kinds of work, and various cost data. It shows how, on numerous hardrock jobs, the detachable Jackbits and I-R reconditioning equipment have raised drilling speed while lowering both drilling and steel-handling expense.

Free copies of this booklet, Form 2780, may be obtained from the manufacturer, 11 Broadway, New York City.

Fluorescent Accessories

A new folder which describes and illustrates G-E accessories for fluorescent lighting, has been announced by the construction materials division of General Electric Company's appliance and merchandise department, Bridgeport, Conn.

The folder illustrates starters, lampholders, starter sockets, combination lampholders and starter sockets, and a manual control switch.

Copies of the fluorescent accessories folder are available on request.

Vari-Pitch Texrope Sheaves

How to increase machine flexibility and output with quick, accurate speed-changing is the story of a new bulletin on Vari-Pitch Texrope Sheaves, released by the Allis-Chalmers Mfg. Co., Milwaukee, Wis. Stationary and motion-control sheaves are described, and operating diagrams, sizes and dimensions are included.

Transmission Handbook

A variable speed transmission catalog, which has taken two years to complete, is announced by the Ideal Commutator Dresser Co., Sycamore, Ill.

It includes 52 pages of recommendations, application data, photos and engineering information.

Appliance & Farm Equipment Catalog

Designed for both city and farm customers, the 1942 full line G-E catalog, "General Electric in the Home—on the Farm," giving prices and specifications of household and farm equipment, has been announced by George E. Mullin, Jr., manager of the G-E farm sales section, appliance and merchandise department, Bridgeport, Conn.

The new 8x10 in. catalog contains 68 pages and has many features not included in the 1941 farm catalog.

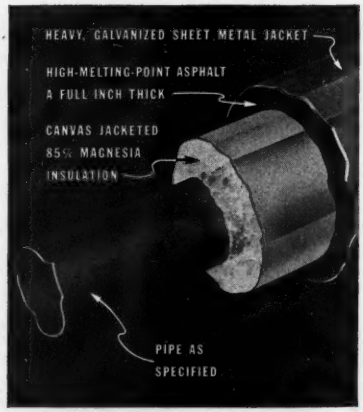
Until appliance stocks are depleted, the 1942 catalog will serve as a valuable sales tool for G-E retailers.

Ehret's D.I.P. gives MAINTENANCE-FREE service on Underground Pipe Lines

TENS of thousands of feet of Durant Insulated Pipe with a record of years of service have proved the ability of this system to stand up under the severest conditions.

The reason lies in its construction. In Ehret's D.I.P. there is combined the time-defying characteristics of asphalt and the high insulating efficiency of 85% Magnesia. Factory pre-fabrication makes field installation rapid and economical. The result is an underground piping system that is outstanding, both in efficiency and long life.

(Send for the Ehret D.I.P. Booklet. It contains complete information on the D.I.P. system.)



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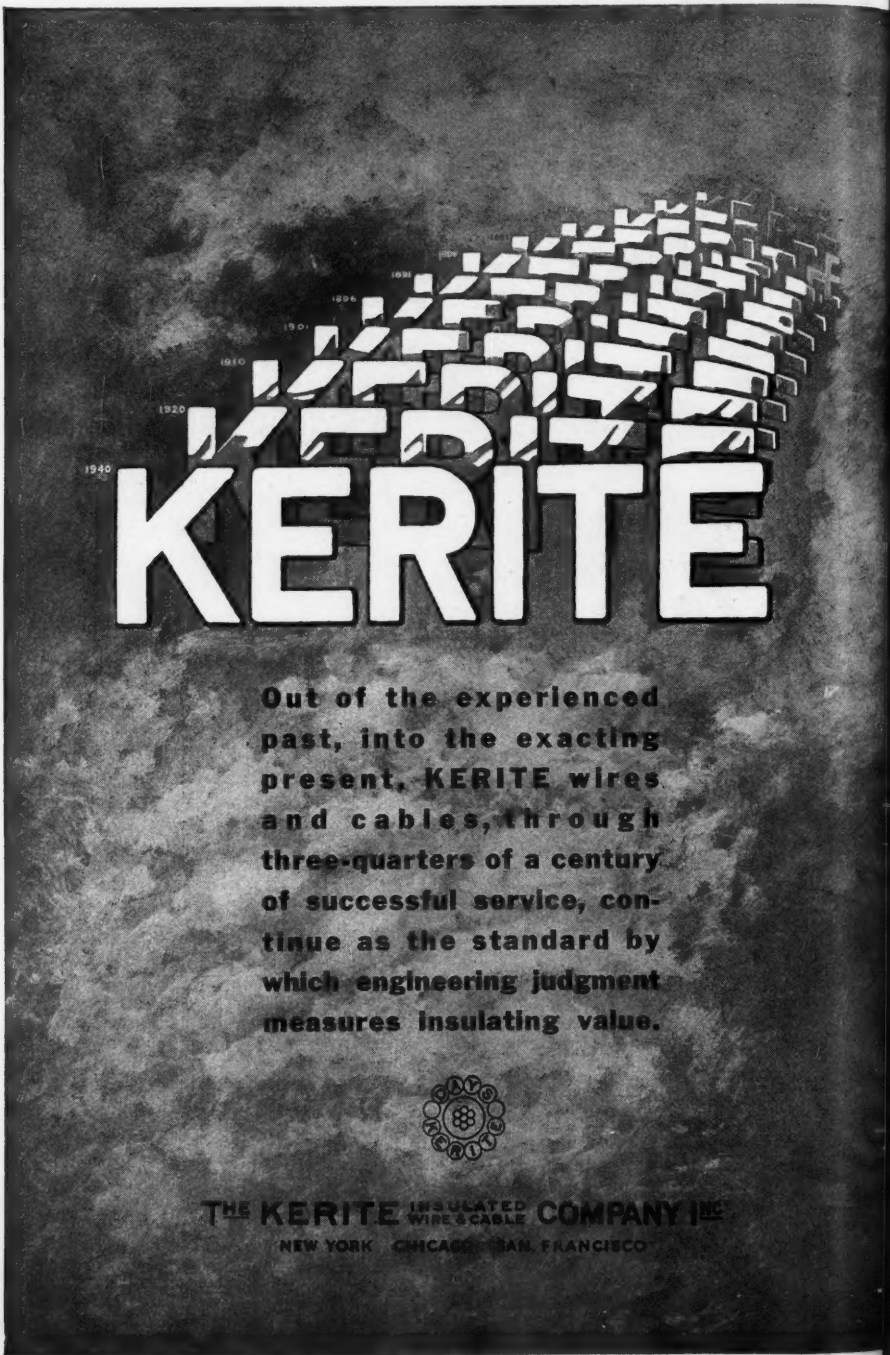

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• This Directory is reserved for engineers, accountants, rate experts, consultants and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, financing, design and construction.

PROFESSIONAL DIRECTORY (*continued*)

(*Professional Directory Concluded on Next Page*)

PROFESSIONAL DIRECTORY *(concluded)*

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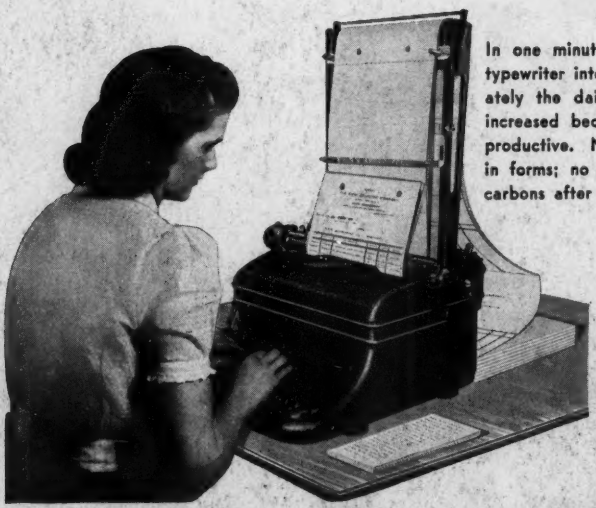

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